2011

Federal National Mortgage Association v. Loraine Sundquist, Individually, and John Doe and Jane Doe : Amicus Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellee -Plaintiff, v. LORAINE SUNDQUIST, Individually, and JOHN DOE AND JANE DOE, Appellants and Defendants.	Supreme Court No. 20110575

STATE OF UTAH'S AMICUS CURIAE BRIEF

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The issues addressed by Amicus Curiae State of Utah in this brief are:

1. Whether ReconTrust is acting in a fiduciary capacity in Texas when it conducts non-judicial foreclosures in Utah.

2. Whether Texas or Utah law governs qualifications of trust deed trustees conducting non-judicial real estate foreclosures in the State of Utah.

INTRODUCTION

INTEREST OF AMICUS CURIAE

In this unlawful detainer action, Appellant Sundquist defends against an eviction action by the Federal National Mortgage Association ("FNMA" or Appellee) on the basis that the trustee of the trust deed conducting the non-judicial foreclosure of her home, ReconTrust, was not a qualified trustee under Utah law. *See* Utah Code § 57-1-21(3). Appellant Sundquist therefore contends that because the foreclosure sale of her home was not valid, FNMA is not entitled to maintain an eviction action.

The State of Utah's interest in this case is limited solely to the issue of whether ReconTrust is a qualified trust deed trustee with a "power of sale" to conduct non-judicial real estate foreclosures in Utah.

Utah's trustee qualification statute requires that a trustee with a "power of sale" be a member of the Utah State Bar, with a "place in the state where the trustor or other interested parties may meet with the trustee," or a title insurance

company that "maintains a bona fide office in the state." Utah Code § 57-1-21(1)(a). The Tenth Circuit Court of Appeals upheld the constitutionality of the statute in *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009), saying: "Making it easier for Utahns to meet with trustees, who play a pivotal role in non-judicial foreclosures, is a legitimate state interest." *Id.* at 1048. It is this "legitimate state interest" that the State seeks to protect in appearing in this case.

Here, ReconTrust conducted the foreclosure of Appellant Sundquist's home. ReconTrust is neither a member of the Utah State Bar nor a title insurance company, and therefore is not a qualified trustee to conduct real estate foreclosures under Utah law. And although Appellant Sundquist raised the issue of whether ReconTrust was a qualified trustee at the district court, the issue was never analyzed or addressed. Presumably the District Court just assumed that ReconTrust had the legal authority to conduct the trustee sale. To the extent the court made that assumption, that is not a correct assumption.

The State's interest is not limited to the Sundquist foreclosure sale alone. As a subsidiary of Bank of America, ReconTrust has been the single largest entity to conduct real estate foreclosures in the State in the last few years.[1] If this Court

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[1]Under an agreement between Bank of America and the Utah Attorney General, ReconTrust ceased its foreclosure operations in Utah in August, 2011.

recognizes ReconTrust as a valid trustee to conduct foreclosure sales, it is likely that ReconTrust will again enter the State to the peril of the Utah homeowners who are trying desperately to save their homes. But such a result would be both untoward and unintended, because the Legislature targeted companies like ReconTrust when it enacted Utah Code Ann. § 57-1-21.

ReconTrust's conduct is without peer. A homeowner who receives a Notice of Default from ReconTrust will find a telephone number listed on the Notice. But a call to that number is answered by a recording, not a live person. And on entering the number associated with the property to be foreclosed, the caller is not transferred to a person, but to another recording that identifies only the date of the foreclosure sale. It is simply not possible for a distressed homeowner facing foreclosure to speak with a real person when he or she contacts ReconTrust. ReconTrust's business practice is one of refusing to deal with distressed homeowners on any level. ReconTrust has insulated its system such that a trustor of a trust deed has no possible means of contacting ReconTrust as the substitute trustee. Indeed, short of driving over a thousand miles to Texas, it is simply not possible for a homeowner facing foreclosure in Utah to speak with anyone conducting the foreclosure at ReconTrust.

The State of Utah has an abiding interest in preserving citizens in their homes, and in protecting the integrity of its statutes. The State wants to be able to enforce it's statutes against unscrupulous trustees of trust deeds who refuse to comply with Utah law. Putting a stop to illegal foreclosures is of paramount concern to the State of Utah and its Attorney General.

BACKGROUND

A. LEGISLATIVE HISTORY OF THE UTAH STATUTE

The Utah Legislature amended the State trustee statute in 2001 to limit the "power of sale" of trustees conducting foreclosure sales in Utah to members of the State Bar who resided in Utah or to title insurance companies with offices in the State. The statute was intended to rein in the ruthlessness of "foreclosure mills" operating in Utah, and to provide Utah's homeowners with at least an opportunity to force a meeting with the trustee of their trust deed in an effort to preserve their homes. This statute was challenged and declared unconstitutional. *See Kleinsmith v. Shurtleff*, No. 2:01-cv-03100 TS, slip op. (D.Utah Aug. 13, 2001). The

Legislature responded in 2002, by amending the statute again, but did not eliminate the residency requirement for attorney/trustees. This amendment was also challenged and again held unconstitutional. *See Kleinsmith v. Shurtleff*, 2:03-

cv-63 TC, slip op. (D.Utah July 3, 2003). Finally, following the guidelines laid out by the federal district court for constitutionality, the Legislature amended the statute a third time in 2004. This amendment was also challenged, but this time was held to be constitutional. *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009).

B. THE UTAH ATTORNEY GENERAL'S DEALINGS WITH BANK OF AMERICA/RECONTRUST CO.

Over the last few years the Utah Attorney General's Office has received hundreds of complaints regarding ReconTrust. In 2010 the Office began an investigation of ReconTrust and by April 2011, was prepared to take legal action against ReconTrust for conducting illegal foreclosures in the State in violation Utah Code §§ 57-1-21 and 57-1-23 as made applicable to national banks through the National Bank Act ("NBA"), 12 U.S.C. § 92a.

The Attorney General soon learned – as had countless homeowners before him – that contacting ReconTrust is not an easy task. No public information is available as to their location, or names of their officers. It is not registered – and

refuses to register – with the State's Division of Corporations.[2] Unable to contact ReconTrust directly, the Utah Attorney General's office finally just contacted the office of the president of Bank of America. Bank of America informed the AG's office to just communicate with the office of the president of Bank of America. On May 19, 2011, the Attorney General sent the president of Bank of America a letter saying that in the opinion of the AG ReconTrust was operating in the State of Utah illegally, and demanded that if ReconTrust did not immediately cease operations, the State of Utah was prepared to take legal action. Attached hereto as Ex. 1.

In June, 2011, four attorneys representing Bank of America met with the Utah Attorney General, his two chief deputies, and an Assistant Attorney General. Bank of America proposed that ReconTrust would cease its Utah operations if the State would not pursue legal action. After some discussion, the Utah Attorney General and Bank of America attorneys reached a gentleman's agreement, and

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[2] A requirement to register with the State solely for purposes of service of process is provided for under 12 C.F.R. §§ 7.4007(b)(2)(vi), and 7.4008(d)(2)(i).

ReconTrust ceased its Utah operations soon thereafter.[3]

In addition, in 2010, together with 48 other States and the U.S. Department of Justice, Utah challenged the nation's 14 largest mortgage servicers, alleging their many abuses, fraud, and unacceptable nationwide mortgage servicing practices. In February 2012, the five largest servicers – of which Bank of America is the largest – reached a $25 billion settlement with the States and DOJ. *See* "Utah Joins $25 Billion Mortgage Settlement Over Foreclosure Misdeeds," Utah AG News Release, Feb. 9, 2012. Attached hereto as Ex. 2.

C. UTAH FEDERAL COURT RULINGS ON THIS ISSUE.

The case law necessary to understand this issue follows a curious path. In *Cox v. ReconTrust, N.A.*, 2011 WL 835893, at *6 (March 3, 2011 D. Utah), Judge Waddoups stated: "Under a straightforward reading of § 92a(b), this court must look to Utah law [as opposed to the laws of some other state] in its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers." In another case Judge Benson stated: "Defendants argue that for purposes of § 92a the laws of the state of Texas apply, not Utah law. The court does not agree.

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[3]The Utah Attorney General's office was informed that ReconTrust ceased operating in the State at the end of July, 2011. But recent pleadings filed by ReconTrust in other cases indicates it did not cease operations in the State until October, 2011.

Instead, the court agrees with the reasoning applied in *Cox v. ReconTrust Company, N.A.,* 2011 WL 835893 (March 3, 2011 D. Utah)." *Coleman v. ReconTrust Co., N.A.*, Case No. 2:10-cv-1099, Slip Op. at 2 (Oct. 3, 2011 D. Utah).

Then in December, 2011, Judge Sam changed course and ruled that Texas law applied to ReconTrust's qualification as a trustee of a trust deed in Utah. *Garrett v. ReconTrust Company, N.A.,* case no. 2:11-cv-00763, slip op. at 3 (Dec. 21, 2011 D.Utah). This was followed in February, 2012, by a decision from Judge Stewart that also held Texas law applies to ReconTrust's qualification as a trustee in Utah. *Dutcher v. Matheson, et al.,* case no. 2:11-cv-666, slip op. at 9 (Feb. 8, 2012 D.Utah).

Then in March, 2012, Judge Jenkins issued a 29-page decision that for the first time reviewed the legislative history of § 92a, the Office of the Comptroller of the Currency's ("OCC") Interpretive Letters regarding § 92a, and applicable court cases. That decision is the first to thoroughly analyze the extant issue. Determining that Texas does not pass Utah banking laws, and Utah does not pass Texas banking laws, Judge Jenkins held that the "plain meaning" of § 92a of the

National Bank Act indicates that a national bank is "located" in the State "in

which it carries on activities as trustee." *Bell v. Countrywide, N.A. d/b/a Bank of America Corporation*, No. 2:11-cv-00271 BSJ, slip op., (D.Utah Mar. 15, 2012). Attached hereto as Ex. 3.

ARGUMENT

I. SECTION § 92a OF THE NATIONAL BANK ACT.

Appellee argues in this case that ReconTrust is a national bank exercising fiduciary powers subject to § 92a of the National Bank Act ("NBA").[4] 12 U.S.C. § 92a. This section of the NBA originated as § 11(k) of the Federal Reserve Act of 1913, and was amended in 1918 by adding what is currently the last-half of subsection 92a(a) and the entirety of subsection 92a(b).[5] In 1962 Congress transferred the administration of the fiduciary powers of national banks from the Federal Reserve Board to the Office of the Comptroller of the Currency, retaining

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[4] ReconTrust has also argued that it "is an operating subsidiary of a federal savings association and is supervised by the Office of Thrift Supervision. C.F.R. § 550.70. A federal savings association's authority to exercise fiduciary powers, including the authority to act as a trustee in foreclosure sales, derives from the Home Owner's Loan Act, 12 U.S.C. § 1464(n)." *See Lawrence v. ReconTrust*, case no. 1:08-cv-66 DB (D.Utah), Notice of Removal, ¶ 4 (Doc. 2), and Eighth Affirmative Defense in Defendants' Answer to Plaintiff's Complaint, (Doc. 6).

[5] Pub. L. No. 63-43, 11(k), 38 Stat. 251, 262 (1913); Pub. L. No. 65-218, 2, 40 Stat. 967, 968-69 (1918).

the then existing language of § 11(k) as § 92a of the National Bank Act.[6]

Section § 92a(a)-(b) of the National Bank Act provides:

> (a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, *when not in contravention of State or local law,* the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> (b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be *in contravention of State or local law* within the meaning of this section.

12 U.S.C. § 92a(a)-(b) (emphasis added). The italicized language above is commonly referred to by the OCC as the "State law condition" or "contravention clause." It is an example of Congress granting a national bank an "explicit power with an explicit statement that the exercise of that power is subject to State law." *Barnett v. Nelson*, 517 U.S. 25, 34 (1996). Thus, even though the NBA preempts

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[6] Pub. L. No. 87-722, 76 Stat. 668 (1962).

State law, § 92a of the NBA provides that national banks exercising fiduciary powers are subject to the law of the State in which they act.

In short, the principle of subsection (a) is that a national bank having fiduciary powers may exercise those powers in a State to the same extent that State allows its State-chartered banks to exercise fiduciary powers. Subsection (b) is somewhat the flip side of subsection (a) in that it provides that a national bank having fiduciary powers may exercise those powers in a State to the same degree a State bank is authorized to exercise those powers – even if that State's laws specifically prohibits national banks from exercising those fiduciary powers. In essence, both subsections stand for the principle that regardless of what a State statute may say relative to a national banks' exercise of fiduciary powers, a national bank may exercise fiduciary powers in a State to the exact same extent that State law permits its State-chartered banks to exercise fiduciary powers.

Tying national banks to the law of the State in which they operate has been known variously in banking law as "parity," "equalization," or "competitive equality."

Appellee and ReconTrust do not deny the existence of the "State law condition," but deny the application of "competitive equality" to § 92a. They claim that the State law ReconTrust is subject to is the law of Texas because that is

where ReconTrust is "located," and hence that is where it conducts its fiduciary business.[7] In this, they are sadly mistaken.

A. UNDERSTANDING THE "STATE LAW CONDITION" IN ITS LEGAL AND HISTORICAL CONTEXT.

We begin with first principles. The National Bank Act, 12 U.S.C. § 21 *et seq.,* first enacted in 1863 and reenacted in 1864, provides for the formation and regulation of national banks. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 449 (1993). National banks are federal instrumentalities, in that they are organized and exist under the laws of the United States – but they are also privately owned businesses headquartered in a particular State and, in general, subject to the laws of that State. *See Nat'l Bank v. Commonwealth,* 76 U.S. (9 Wall.) 353, 361-62 (1869), *Guthrie v. Harkness,* 199 U.S. 148, 157 (1905). Rather than displace State banking systems, the National Bank Act established what has come to be known as the "dual banking system," in which federal and State chartered banks coexist in relative "competitive equality." *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 131-33 (1969), *First Nat'l Bank of*

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[7]In some cases, however, ReconTrust has claimed that its fiduciary activities are conducted in California when conducting foreclosures in Utah. *See Lawrence v. ReconTrust,* case no. 1:08-cv-66 DB (D. Utah), Mem. in Support of Cross-Motion for Sum. J., p. 15. (Doc. 45.)

Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252, 261-63 (1967).

"There can be little question... that at the time the 1864 Act was passed, the activities of a national bank were restricted to one particular location." *Citizens and Southern Nat'l Bank v. Bougas,* 434 U.S. 35, 42-43 (1977). That is, a national bank had one bank location and was limited to doing business only at that location. That condition existed for national banks until 1927, when Congress passed the McFadden Act allowing national banks to establish branches to the extent permitted by State law. 44 Stat. 1228.

Thus, when Congress originally passed § 92a(a)'s "State law condition" in 1913 it was dealing with a legal and fact situation in which a national bank was limited by its charter to operating at only one location. That was also the case when subsection (b)'s State law condition was drafted in 1918. So, the language of § 92a(a) and (b) – which has never been amended – never contemplated today's national banking system of national banks operating in multiple States. As a result, the language of the statute may not be as crystal clear in applying the concept of the "State law condition" today as when it was drafted. But the concept of the "State law condition" is very much a part of the statute and its meaning is central to this case.

B. "COMPETITIVE EQUALITY" IS THE KEY TO UNDERSTANDING

WHICH STATE LAW APPLIES UNDER THE "STATE LAW CONDITION"

When Congress passed what is now § 92a in 1913, it was not concerned with dissecting where a bank was located versus where it conducted its fiduciary activities – those were synonymous at the time. And Congress certainly did not write the language of § 92a in 1913-18 contemplating today's multi-state banking system. Rather, Congress was concerned with providing a level playing field – or "competitive equality" – between national and State banks conducting business in the same State. Making national banks subject to State law put national banks on the same footing as State banks. That is what is meant by the terms "parity," "equalization," and/or "competitive equality."

"The policy of competitive equality is ... firmly embedded in the statutes governing the national banking system," wrote Chief Justice Warren Burger. "The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation." *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133 (1969).

Every federal court to have had occasion to opine on the subject of applying competitive equality to § 92a has held that it applies. In 1976, the Eight Circuit

Court of Appeals stated, "[t]he policy of competitive equality was incorporated into section 92a." *St. Louis County National Bank v. Mercantile Trust Co., N. A.*, 548 F.2d 716, 720 (1976). Ten years earlier, the Fifth Circuit determined it "is obvious from the most cursory reading of ... 12 U.S.C. § 92a" that it places "national banks on an equal competitive basis with state banks and trust companies in the state where the national bank is situated." *Blaney v. Florida National Bank at Orlando,* 357 F.2d 27, 30 (1966).

So too in *American Trust Co. v. South Carolina State Board of Bank Control,* 381 F.Supp. 313, 323 (D.S.C. 1974), in which a federal district court said:

> [When Congress] authorized national banks to operate branches to the same extent that a state bank located in the same state could operate them, it intended to create 'competitive equality' between state and national banks located in the same state. It is apparent that in enacting § 92a, Congress intended to create the same kind of 'competitive equality' with regard to trust services.

(internal citations omitted.) In *New Hampshire Bankers Assoc. v. Nelson*, 336 F.Supp. 1330, 1334 (1972), the court held: "The New Hampshire statute does not put the national banks at any competitive disadvantage with state banks. Both are treated equally. 12 U.S.C. § 92a allows national banks to offer the equivalent fiduciary services to their customers as do state banks." Aff'd, 460 F.2d 307 (1st

Cir.), cert. denied, 409 U.S. 1001, 93 S.Ct. 320, 34 L.Ed.2d 262 (1972). And in *Investment Company Institute v. Camp,* 274 F.Supp. 624 (1967), the D.C. District Court stated that "Section 12 U.S.C. 92a(a), however, permits a national bank to act 'in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.'" *Id.* at 640.

1. WHILE "COMPETITIVE EQUALITY" IS MOST COMMONLY ASSOCIATED WITH BRANCH BANKING, IT IS CERTAINLY NOT LIMITED TO THAT.

The concept of competitive equality has historically received the greatest attention in the area of branch banking, but it is not limited only to that area of banking law. As is stated in the most oft-cited case on the subject, involving two national banks that were attempting to establish branch banks in the State of Utah, the U.S. Supreme Court declared that the Comptroller of the Currency could not trump Utah law:

> ... Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned.
> * * * *To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864.*

First Nat'l Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 261 (1966) (emphasis added).

In addition to fiduciary activities and branch banking, Congress has expressly incorporated State law as the governing standard for national banks in such banking areas as conversions of state banks into national banks, *see* 12 U.S.C. § 35; interstate de novo branch banks, *see* 12 U.S.C. § 36(g); accepting deposits from state and local governments, *see* 12 U.S.C. § 90; mergers or consolidation of national banks with state banks, *see* 12 U.S.C. § 214c; acquisitions of state banks by consolidation, *see* 12 U.S.C. § 215(d); and acquisitions of state banks by merger, *see* 12 U.S.C. § 215a(d).

2. APPLYING "COMPETITIVE EQUALITY" TO THIS CASE.

It is hardly a matter of "competitive equality" to require a national bank located in Texas, but conducting business in Utah, to follow one set of rules, and require another national bank, which is both located and conducting business in Utah, to follow another set of rules. That scenario flies in the face of a "level playing field." But that is Appellee's argument: a national bank located in Texas plays by Texas rules when conducting business in Utah, while national banks located in the State has to play by Utah's rules. That makes no sense.

II. RECONTRUST'S CLAIM FOR EXEMPTION FROM UTAH LAW.

A. WHERE DOES A SUBSTITUTE TRUSTEE OF A TRUST DEED ACCEPT ITS APPOINTMENT?

ReconTrust relies on one sentence in Rule 9.7(d) to support its claim that ReconTrust acts in Texas when it conducts foreclosures in Utah. 12 C.F.R. § 9.7(d). Aplee. Br., p. 24-25. That sentence reads: "A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets." Rule 9.7 is attached hereto as Exhibit 4.

Appellee claims that Texas is where ReconTrust accepts its fiduciary appointment to act as a substitute trustee of a trust deed, but there is no formal appointment procedure in Texas for appointing a substitute trustee of a trust deed in Utah.[8] Rather, the appointment of a trustee of a trust deed originates with the trust deed itself. Without the trust deed there is no trustee. In the case of a Utah trust deed, the document evidencing the appointment of a substitute trustee is the Notice of Substitution of Trustee. Utah Code § 57-1-22(1)(a) states:

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[8]In all the cases challenging ReconTrust as qualified trustee in Utah, ReconTrust has never once supplied the court with a document evidencing an appointment as substitute trustee – other than the notice of substitution of trustee.

> The beneficiary may *appoint* a successor trustee at any time *by filing for record* in the office of the county recorder of each county in which the trust property or some part of the trust property is situated, a *substitution of trustee*. (Emphasis added.)

Thus, there is no appointment of a substitute trustee for a trust deed recorded in Utah until the Notice of Substitution of Trustee is recorded in the county recorder's office in which the property is situated.

For a foreclosure in Utah, there is no such thing as a formal appointment of a substitute trustee other than the recording of the Notice of Substitution of Trustee. Executing the substitution of trustee – without recording it – has no legal significance. The appointment, as stated in Utah Code § 57-1-22(1)(a), occurs when the Notice of Substitution of Trustee is recorded in the county in with the property is situated. That constitutes the appointment. There is no statutory criteria for what constitutes the appointment in federal law or regulation. Rather, the only legal criteria for the appointment of a trustee of a Utah trust deed is Utah law.

The same applies to other documents ReconTrust executes to conduct a foreclosure, i.e. Notice of Default and Notice of Trustee's Sale. Where the document is executed has absolutely no legal effect. Where they are recorded

does. *See* Utah Code §§ 57-1-24 and 25. And for a Notice of Default and Notice of Trustee's Sale to have legal effect for purposes of foreclosing a trust deed in Utah, those notices must be recorded in the county in which the property is situated. Recording is what gives those documents legal effect – not where they are executed.

But Appellee persists by saying:

> Indeed, nothing in the record or in Sundquist's brief indicates that Utah is where ReconTrust accepts its fiduciary appointment, executes documents creating the fiduciary relationship, or makes discretionary decisions. Accordingly, pursuant to 12 C.F.R. § 9.7(e)(1) '[t]he state laws that apply to [ReconTrust's] fiduciary activites by virtue of 12 U.S.C. § 92a are the laws of' Texas, not Utah.

Aplee. Br., p. 26. The irony with this statement is that neither is there anything in the record that indicates that Texas is where ReconTrust accepts its fiduciary appointment, executes documents creating the fiduciary relationship, or makes its discretionary decisions. The record is just absent any of that evidence. But Utah law makes perfectly clear what constitutes an appointment of a substitute trustee. It also makes clear that the other documents necessary to process a non-judicial foreclosure only have legal significance when they are recorded.

B. WHERE IS A BANK "LOCATED"?

In arguing that ReconTrust is a valid trustee to conduct foreclosures in Utah, Appellee states:

> ReconTrust is a national banking association operating under the NBA, which specifies that the state law applicable to ReconTrust's authority to act as trustee is the State law where the bank is "located" (12 U.S.C. § 92a(a)). ReconTrust is "located" in Texas and, under the NBA and implementing regulations, it must conform its activities to Texas law. To the extent that Utah law imposes additional requirements on ReconTrust, it is preempted by the NBA and the OCC's regulations implementing the statute, 12 C.F.R. § 9.7.

Aplee. Br., p. 23.

1. The OCC's Statement of Basis and Purpose for Rule 9.7 States that "Location" is not Determined by the Presence of a Main Office or Branch.

In the basis and purpose statement accompanying the promulgation of Rule 9.7, set out in the Federal Register in 2001, the OCC declares, "we disagree that 'location' for purposes of section 92a is appropriately determined by the presence of a main office or bank branch." 66 FR 34792-01, at *34794, 2001 WL 731641. The OCC Statement of Basis and Purpose for Rule 9.7 is attached hereto as Exhibit 5.

The OCC's analysis of Rule 9.7 completely undoes Appellee's and ReconTrust's argument as to the one sentence they persist in quoting from Rule 9.7(d). The OCC makes clear that where a bank is headquartered, or has a branch bank, does not determine where it is located for purposes of the "State law condition." Rather, where the bank acts is the determining factor. Referring to § 92a's "contravention clause," the OCC states:

> [S]ection 92a(a) requires that a national bank look to the laws of the state in which it acts, or proposes to act, in a fiduciary capacity to determine what fiduciary capacities are permissible.

66 FR 34792-01, at *34794.

The OCC's analysis makes no mention of a bank being required to comply with the State law where it has a physical office – and Appellee has cited none. Instead, Appellee insists on citing just the one sentence from Rule 9.7(d), and giving it an interpretation entirely inconsistent with the plaining meaning provided by the OCC. But the OCC's position could not be more clear. The OCC analysis continues:

> Moreover, we disagree that "location" for purposes of section 92a is appropriately determined by the presence of a main office or bank branch. As previously discussed, the Contravention Clause of section 92a requires that a bank look to the laws of the state in which

> it acts in one or more fiduciary capacities in order to determine the limits on those capacities.

Id. at *34794-95.

To circumvent the plain import of this Rule, Appellee asserts that when ReconTrust conducts real estate foreclosures in Utah, it is really "acting" in a fiduciary capacity in Texas. But even ignoring the recording requirements of the Utah statutes for the notices necessary to maintain a foreclosure in Utah, how can Appellee and/or ReconTrust say that the actual sale of the property – which is conducted at the courthouse of the county in which the property is situated – is a fiduciary act occurring in Texas? In practical terms, the recording of notices are but incidental steps to completing a foreclosure. It is the actual auctioning of the property at the courthouse that culminates the foreclosure process – and even Appellee concedes that that act, for purposes of foreclosing a property in Utah, takes place in Utah.

As Judge Jenkins said in *Bell v.Countrywide,* for ReconTrust to claim that it is acting in a fiduciary capacity in Texas when it exercises the trustee's power of sale in Utah is "fantasy." *Bell,* slip op., p. 24.

2. According to the OCC a Bank is Present in a State for Purposes of § 92a if it is "Merely Doing Business" in that State.

In 2000, the OCC gave notice of proposed rulemaking for a new Rule 9.7. As stated by the OCC in the Federal Register, the purpose of that rule was to "codify" Interpretive Letters 695, 866, and 872. 65 FR 75872-01, 2000 WL 1772315.[9]

Interpretive Letter ("IL") 695 specifically addresses the very issue ReconTrust raises in this case. 1996 WL 187825. It says that a national bank *merely doing business* in a State is considered "present" in that State for purposes of § 92a, and therefore is subject to the laws of that State. *Id.* at *13. In discussing the term "located" as used in § 92a, the OCC is very clear that Congress did not intend that the provisions of § 92a to mean that a national bank could attach itself to one State and then have that State's laws follow the bank wherever it operated nationwide. As the OCC states:

> Thus, in our view, with respect to a national bank that proposes to offer fiduciary services in more than one state, *section 92a applies equally for each and every*

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[9]ReconTrust has previously argued that Rule 9 supercedes IL 695. But in reality, Rule 9.7 is based on IL 695, along with ILs 866 and 872. IL 695 is an 18-page legal opinion. Rule 9.7 is a one-page statement of the principles of the those ILs.

> *state.* The use of a singular term in section 92a ("whenever the laws of such state . . ."; "the laws of the state in which the bank is located") *does not imply that Congress intended that the provisions of section 92a would apply only to one state for each national bank.*

Id. at *12 (emphasis added.)

The OCC's Interpretative Letter authoritatively states that a bank exercising fiduciary duties is subject to the law of the State in which it is conducting those fiduciary activities. Key to that understanding is the following:

> Thus, section 92a authorizes national banks to offer fiduciary services in multiple states, but *then conditions the exercise of that power within each state on a state-by-state basis* under the same test: is the exercise of fiduciary powers by national banks prohibited by state law, and even if it is, does that state permit its state institutions to exercise these powers or not. This result is consistent with other banking statutes that treat a single national bank as present in different states for purposes of that statute.

Id. at *12 (emphasis added).

Citing a half-dozen court cases and prior OCC interpretive letters that hold that a bank is "located" in a State in which it is conducting its fiduciary activities, IL 695 applies the same legal principles to § 92a, declaring:

> In these other instances, just as with section 92a here, the statutes were similarly applied to the bank on a state-by-state basis. The bank was considered *present* in each state - through a branch, another type of office, or *merely*

> *doing business* - and treated under the statute in the same manner as any other national bank in the state.

Id. at *13 (emphasis added). This interpretation, the OCC states, fosters "desirable public policies" because:

> First, every national bank offering fiduciary services in a given state will have the same authority to conduct fiduciary business. A national bank conducting fiduciary business and administering trust assets at a trust office will be subject to the same standards irrespective of whether the office is part of an in-state national bank or an out-of-state national bank. Second, *there will be a level playing field for enhanced competition in the provision of fiduciary services within each state, because more potential providers will be able to compete on similar terms.*

Id. at *14 (emphasis added).

So the questions to be asked here are: Is there a level playing field in Utah if a national bank headquartered in Texas follows Texas law when conducting its fiduciary activities in Utah, while national banks located in Utah must follow Utah law? Is it a level playing field when Utah State-chartered banks are expressly prohibited from conducting trust deed foreclosures, but national banks headquartered out-of-state are not? And what about national banks with offices in the State? Is it a level playing field if ReconTrust can conduct non-judicial real estate foreclosures in Utah, but national banks with offices in Utah cannot?

III. AVOIDING AN ABSURD RESULT

Under ReconTrust's theory that its location should determine the law to be applied, creates an absurdity. Under that theory, it is conceivable that every State's trustees law applies to foreclosures in the State of Utah – except Utah's. ReconTrust has argued in cases in federal court here that, depending upon the case, either California or Texas law applies to foreclosures in Utah. But which? And does it matter? If a national bank is located in Illinois, and is conducting foreclosures in Utah, then under ReconTrust's theory Illinois' trustee law applies. Likewise for a national bank located in Florida. Under ReconTrust's theory, "making it easier for Utahns to meet with trustees" would not be a "legitimate state interest" of the State of Utah, *see Kleinsmith*, 571 F.3d at 1048, but rather the interest of the State of California, Texas, Illinois, Florida or some other State legislature – any State legislature but Utah's. Under that scenario, for the Utah legislature to attempt to "make it easier for Utahns to meet with trustees, who play a pivotal role in nonjudicial foreclosures," the Utah legislature would have to lobby the legislatures of California, Texas, Illinois, Florida. Under the theory being propounded by Appellee, every State except Utah would have jurisdiction over the qualifications of trustees conducting nonjudicial foreclosures in Utah. That is absurd.

CONCLUSION

As this case pertains to the underlying issue regarding whether ReconTrust was a qualified trustee to conduct the foreclosure sale of Appellants Sundquist's home, this Court should declare that:

1. Under the "State law condition" of §92a of the National Bank Act, Utah law governs the acts of national banks exercising fiduciary duties in the State of Utah, and

2. ReconTrust is not a qualified trustee for purposes of conducting nonjudicial real estate foreclosure sales in the State of Utah.

Dated this 17th day of August, 2012.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JERROLD S. JENSEN
Assistant Utah Attorney General

CERTIFICATE OF COMPLIANCE

This brief contains 7,207 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

JERROLD S. JENSEN

Dated: 8/17/12

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2012, I served by electronic mail a true and exact copy of the foregoing **STATE OF UTAH'S AMICUS CURIAE BRIEF** to:

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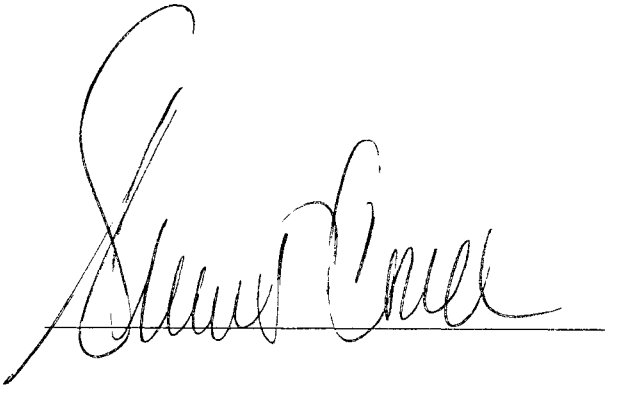

ADDENDUM 1

AG Shurtleff Letter to Bank of America, May 19, 2011

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

JOHN E. SWALLOW
Chief Deputy

Protecting Utah • Protecting You

KIRK TORGENSEN
Chief Deputy

May 19, 2011

Brian T. Moynihan
President, Bank of America
100 North Tryon St.
Charlotte, NC 28255

Re: ReconTrust Co., N.A.

Dear Mr. Moynihan:

As Attorney General for the State of Utah, I am statutorily charged with enforcing Utah's laws in the State of Utah. In that capacity I have determined that ReconTrust, N.A., is not in compliance with Utah Code §§ 57-1-21 and 57-1-23 when conducting real estate foreclosures in the State of Utah.

Utah Code §§ 57-1-21(3) and 57-1-23 provide that the only valid trustees of trust deeds with the "power of sale" are those who are either members of the Utah State Bar or title insurance companies. Since ReconTrust is neither of these, all real estate foreclosures conducted by ReconTrust in the State of Utah are not in compliance with Utah's statutes, and are hence illegal.

These code sections were passed by the Utah Legislature in 2001 and 2004 for the specific purpose of protecting Utah citizens in their homes when they are faced with the potential of a real estate foreclosure. The constitutionality of this legislation was ultimately upheld by the United States 10th Circuit Court of Appeals in *Shurtleff v. Kleinsmith*, 571 F.3d 1033 (2009).

It is my understanding that ReconTrust claims that as a national bank it is exempt from following Utah law in exercising its fiduciary powers. This office adamantly disagrees with that position on the basis that the section of the National Bank Act granting national banks authority to act in a fiduciary capacity specifically states that such authority shall be exercised only "when not in contravention of State or local law." 12 U.S.C. 92a(a) and (b).

UTAH STATE CAPITOL • 350 NORTH STATE STREET, SUITE 230 • P.O. BOX 142320 • SALT LAKE CITY, UTAH 84114-2320

Thus, ReconTrust's exercise of fiduciary powers in the State of Utah is a violation not only of State law, but also applicable federal law.

The purpose of this letter is to give you notice that the Utah Attorney General's office intends to enforce Utah's statutes against those conducting business in Utah, and that includes enforcement of the real estate trustee qualification statute. I would appreciate a response to this letter from you within 30 days of the date of this letter informing me of how you intend to proceed. I am willing to discuss this issue with you or your attorneys if you like.

Sincerely,

Mark L. Shurtleff
Utah Attorney General

MLS/se

ADDENDUM 2

"Utah Joins $25 Billion Mortgage Settlement Over Foreclosure Misdeeds,"
Utah AG News Release, Feb. 9, 2012

NEWS RELEASE

Protecting Utah • Protecting You

UTAH ATTORNEY GENERAL
MARK SHURTLEFF

For Immediate Release
February 9, 2012

Contact
Paul Murphy, A.G's Office:
(801) 538-1892
pmurphy@utah.gov
Allyson Isom, Governor's Office:
(801)538-1503
aisom@utah.gov

UTAH JOINS $25 BILLION MORTGAGE SETTLEMENT OVER FORECLOSURE MISDEEDS

UTAH GETS ESTIMATED $171 MILLION FROM AGREEMENT

Utah Attorney General Mark Shurtleff and Utah Governor Gary R. Herbert announced a landmark $25 billion joint federal-state agreement today with the nation's five largest mortgage servicers over foreclosure abuses and fraud and unacceptable nationwide mortgage servicing practices.

The proposed agreement provides an estimated $171,115, 273 in total benefits to the state of Utah. The total includes an estimated $45 million in direct relief to Utah homeowners and $102 million indirect relief and addresses future mortgage loan servicing practices. The state will receive direct payment of $22,987,615.

"This is the second largest settlement ever by the states and addresses serious misconduct against homeowners in Utah and other states," says Shurtleff. "This agreement provides relief to homeowners and also stops the outrageous conduct that led to the mortgage crisis."

"I commend the diligence and hard work of Utah's Attorney General and his staff to right a wrong," says Governor Herbert. "We hope those affected by the foreclosure crisis will take advantage of the programs and resources available through this settlement. I hope this sends a message that this kind of fraudulent conduct is not tolerated."

U.S. Attorney General Eric Holder, U.S. Housing and Urban Development (HUD) Secretary Shaun Donovan and a bipartisan group of state attorneys general announced the national settlement today in Washington, D.C.

Utah borrowers who lost their home to foreclosure from January 1, 2008 through December 31, 2011 and suffered servicing abuse would qualify. Approximately 23% of Utah homes are now underwater.

The unprecedented joint state-federal settlement is the result of a massive civil law enforcement investigation and initiative that includes state attorneys general and state banking regulators across the country, and nearly a dozen federal agencies. The settlement holds banks accountable for past mortgage servicing and foreclosure fraud and abuses and provides relief to homeowners. With the backing of a federal court order and the oversight of an independent monitor, the settlement stops future fraud and abuse.

Under the agreement, the five servicers have agreed to a $25 billion penalty under a joint state-national settlement structure

Here are highlights of the settlement:

Servicers commit a minimum of $17 billion directly to borrowers through a series of

national homeowner relief effort options, including principal reduction. Given how the settlement is structured, servicers will actually provide up to an estimated $32 billion in direct homeowner relief.

- Servicers commit $3 billion to a mortgage refinancing program for borrowers who are current, but owe more than their home is currently worth.
- Servicers pay $5 billion to the states and federal government ($4.25 billion to the states and $750 million to the federal government). The state payments include funding for payments to borrowers for mortgage servicing abuse.
- Homeowners receive comprehensive new protections from new mortgage loan servicing and foreclosure standards.
- An independent monitor will ensure mortgage servicer compliance.
- Government can pursue civil claims outside of the agreement, any criminal case; borrowers and investors can pursue individual, institutional or class action cases regardless of agreement.

The settlement does not grant any immunity from criminal offenses and will not affect criminal prosecutions. The agreement does not prevent homeowners or investors from pursuing individual, institutional or class action civil cases against the five servicers. The pact also enables state attorneys general and federal agencies to investigate and pursue other aspects of the mortgage crisis, including securities cases.

"This agreement addresses some breakdowns in the mortgage servicing industry but still allows us to go after other misdeeds," says Chief Deputy Attorney General John Swallow. "Significantly, those who are still underwater in their homes could be eligible for principal reductions and loan modifications that would not otherwise be available had we gone to trial."

The final agreement, through a consent judgment, will be filed later in U.S. District Court in Washington, D.C., and will have the authority of a court order.

Because of the complexity of the mortgage market and this agreement, which will span a three year period, in some cases participating mortgage servicers will contact borrowers directly regarding loan modification options. However, borrowers should contact their mortgage servicer to obtain more information about specific loan modification programs and whether they qualify under terms of this settlement. Settlement administrators or state attorneys general may also contact borrowers regarding certain aspects of the settlement.

More information on the proposed settlement is available at these webs sites and phone numbers:

www.NationalForeclosureSettlement.com
www.HUD.gov
www.DOJ.gov
Bank of America: 1-877-488-7814
Citi: 1-866-272-4749
Chase: 1-866-372-6901
GMAC: 1-800-766-4622
Wells Fargo: 1-800-288-3212

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ADDENDUM 3

Bell v. Countrywide, N.A. d/b/a Bank of America Corporation,
No. 2:11-cv-00271 BSJ, slip op., (D.Utah Mar. 15, 2012)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TIMOTHY R. BELL, an individual; and JENNIFER BELL, an individual, Plaintiffs, vs. COUNTRYWIDE BANK, N.A. d/b/a BANK OF AMERICA CORPORATION, a Delaware corporation; BAC HOME LOANS SERVICING, LP, a Texas limited partnership; RECONTRUST COMPANY, N.A , a national association; and DOES 1-5, Defendants.	)	Civil No. 2:11-CV-00271-BSJ **MEMORANDUM OPINION & ORDER (Fed. R. Civ P. 12(b)(6))**

* * * * * * * * *

I. INTRODUCTION

This matter arises out of plaintiffs' alleged default on a promissory note secured by a deed of trust on their primary residence. On October 8, 2009, defendant ReconTrust, a successor trustee, recorded with the Salt Lake County Recorder a notice of default and election to sell plaintiffs' property to collect on the note.[1] Plaintiffs filed a complaint challenging the prospective sale in Third District Court, Salt Lake County, Utah. Defendants subsequently removed the case to this court, alleging diversity.

At a hearing on August 30, 2011, plaintiffs represented that they "would like to bring an amended complaint seeking judicial determination about the right of ReconTrust [the successor

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[1](*See* Pls.' Third Am. Compl., filed Sept. 15, 2011 (dkt. no. 68) ("Pls.' Compl."), at Ex. C.)

trustee] to foreclose this trust deed."[2] Plaintiffs also requested leave to amend the complaint to state a cause of action for promissory estoppel on the loan modification issues.[3] At that time, plaintiffs stated that "as to those two items, we'd like the Court's leave to file an amended complaint and continue on our way."[4] The court granted leave to amend,[5] ordering that plaintiffs file their amended complaint by September 16, 2011.[6]

Plaintiffs filed an amended complaint on September 15, 2011,[7] which asserted the following among other things: (1) absence of authority of ReconTrust and "preliminary injunction" (as against all defendants), (2) breach of an alleged modified contract (as against BAC and BAC Servicing), and (3) promissory estoppel (as against BAC and BAC Servicing).

On September 30, 2011, defendants filed a Rule 12(b)(6) motion to dismiss for failure to state a claim,[8] arguing that the complaint exceeded the authorization to amend. Although defendants assert that plaintiffs' claim for preliminary injunction "is not a claim at all but rather a

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[2](Transcript of Hearing, dated Aug. 30, 2011 (dkt. no. 77) ("Mot. Amend Hr'g Tr."), at 5:7–9; *see also id.* at 6:11–13.)

[3](*Id.* at 5:19–22)

[4](*Id.* at 5:23–24.)

[5](*Id.* at 22:19–20.)

[6](*See id.* at 23:17–24:9; Order, filed September 21, 2011 (dkt no. 69).)

[7](*See* Pls.' Compl.) Plaintiffs titled the amended complaint as "Third Amended Complaint" when in fact it should have been titled "Second Amended Complaint." Although on May 31, 2011 plaintiffs filed a motion to amend/correct their first amended complaint (dkt. no. 36),—and filed concurrently therewith a *proposed* second amended complaint (dkt. no. 38)—the court never granted that motion to amend. Accordingly, the proposed second amended complaint was never operative, and what plaintiffs have titled as the "Third Amended Complaint" is actually the "Second Amended Complaint."

[8](*See* Defs.' Mot. Dismiss Pls.' Third Am. Compl., filed Sept. 30, 2011 (dkt. no. 70) ("Defs.' Mot. Dismiss").)

form of relief that cannot constitute an independent cause of action,"[9] paragraphs 52–56 of the amended pleading adequately raise the question as to whether ReconTrust has authority to conduct nonjudicial foreclosures on real property in Utah.

The question is of continuing importance because Utah Code Ann. § 57-1-23.5(2) (Supp. 2011)[10] provides a private cause of action to a trustor whose real property has been the subject of an unauthorized sale by an unauthorized person. Plaintiffs assert ReconTrust is unauthorized to "foreclose."

Defendants may have a point that plaintiffs may have exceeded the scope of the court's leave to amend,[11] but the court need not address the promissory estoppel claim nor the breach of contract issue at this time. The immediate and substantive question before the court is whether ReconTrust has authority to sell real property at a nonjudicial foreclosure sale in Utah.

On November 10, 2011, defendants' motion came on for hearing and was argued to the court, at which time the court reserved on the matter and requested supplemental briefing from both parties as to the legislative history of 12 U.S.C. § 92a. Curiously, at the hearing, defendants notified the court for the first time that on November 2, 2011, ReconTrust had been succeeded as trustee by an attorney named Armand J. Howell.[12] Defendants then asserted that plaintiffs' claim

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[9](*See* Defs.' Mem. Supp. Mot. Dismiss Pls.' Third Am. Compl. (dkt. no. 71) ("Defs.' Mem."), at 2.)

[10]Subsection (2)(a) states that "[a]n authorized person who conducts an unauthorized sale is liable to the trustor for the actual damages suffered by the trustor as a result of the unauthorized sale or $2,000, whichever is greater."

[11](*See* Defs.' Mem. at 5–6.)

[12](Transcript of Hearing, dated Nov. 10, 2011 (dkt. no. 80) ("Mot. Dismiss Hr'g Tr."), at 7:16–8:5, 33:17–19.)

as to ReconTrust had become moot.[13] In light of Mr. Howell's recent appointment as successor trustee, the court also requested the parties to brief whether the ReconTrust issue was capable of repetition.[14]

II. DISCUSSION

At this point, the court need only determine whether to grant or deny defendants' motion to dismiss.

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[15] While "the pleading standard Rule 8 announces does not require detailed factual allegations, . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[16]

Prior to dealing with the substantive question, the court must first determine whether plaintiffs' claim is now moot.

A. Plaintiffs' claim against ReconTrust is not moot

This court's jurisdiction and constitutional authority under Article III of the Constitution do not extend to moot cases, but only to actual cases or controversies.[17] The mootness doctrine is

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[13](*Id.* at 33:12–16.)

[14](*Id.* at 72:22–73:3.)

[15]*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and quotations omitted).

[16]*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotations omitted).

[17]*Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983).

grounded in the idea that "'federal courts only decide actual, ongoing cases or controversies,'"[18] and that "a case or controversy no longer exists when it is impossible to grant any effectual relief."[19]

However, a case is not moot if it "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'"[20] Two elements must be present for a case to fall within this exception: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[21]

The Supreme Court has stated that a federal court's "concern in these cases, as in all others involving potentially moot claims, [is] whether the controversy [is] *capable* of repetition and not . . . whether the claimant ha[s] demonstrated that a recurrence of the dispute was more probable than not."[22] Indeed, the possibility of recurrence need not be "established with mathematical precision," but rather the court need only find a "reasonable expectation" of repetition.[23] Certainly, the bar is not high for a party to withstand a challenge for mootness.

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[18] *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1242 (10th Cir. 2011) (quoting *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1491 (10th Cir. 1993)); *see also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 571 (2009).

[19] *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 891 (10th Cir. 2008).

[20] *Turner v. Rogers*, 131 S. Ct. 2507, 2514–15 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

[21] *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

[22] *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988) (emphasis in original).

[23] *Id.*

When presented with a question of mootness the court also has an "interest in 'preventing litigants from attempting to manipulate the Court's jurisdiction.'"[24] "The concern is that a party's change in position may be temporary and thus abandoned once the litigation ends."[25] Therefore, it is "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."[26] In cases where the court is concerned with a party's potential manipulation of the court's jurisdiction, the Tenth Circuit looks at two additional factors. (1) whether "it is not 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur[,]'"[27] and (2) whether the litigant is attempting to seal a favorable decision from review.[28]

Additionally, there are certain matters that come before a court that are too important to be denied effective review; for example, when the nature of the issue is sufficiently compelling in relation to the enforcement of the laws and the private rights involved.[29]

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[24]*Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (quoting *City of Erie v. PAP'S A M*, 529 U.S. 277, 288 (2000)).

[25]*Id.*

[26]*City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In *Alladin's Castle*, a city exempted a business from a city ordinance in response to the business' challenge that the ordinance was unconstitutional. However, after a state court decision was issued regarding the matter, the city adopted a new ordinance which repealed the business exemption. *See id.* at 286–87, 289.

[27]*Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1028 (10th Cir. 2003) (quoting *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1236 n.17 (10th Cir. 2002)).

[28]*See Seneca-Cayuga Tribe*, 327 F 3d at 1029 ("We, however, read *City of Erie* as expressing a generalized concern about manipulation of an appellate court's jurisdiction to seal a favorable decision from review. Here, appellees' conduct, while presumably not in bad faith, nonetheless implicates the concern over post-trial manipulation.").

[29]*Cf. In re Carlson*, 580 F.2d 1365, 1372 (10th Cir. 1978) (deciding to entertain the issue

(continued...)

Here, defendants assert that "Plaintiffs cannot allege a live case or controversy vis-a-vis ReconTrust and this Court cannot grant Plaintiffs any effectual relief as to the preliminary injunction claim"[30] because ReconTrust is no longer the trustee on the plaintiffs' deed of trust, and "in fact, ReconTrust ceased operations in Utah in October 2011 "[31]

This court disagrees The question of mootness arose on November 2, 2011, when defendants substituted a licensed Utah attorney as trustee in the place of ReconTrust However, plaintiffs and others are certainly capable of being subjected to ReconTrust's actions once again Plaintiffs correctly assert that the "beneficiary may appoint a successor trustee *at any time*,"[32] meaning that there is nothing prohibiting defendants from again substituting ReconTrust as successor trustee at a later date

Although defendants represent that ReconTrust ceased operations in Utah in October 2011, they have supplied this court with one order and one memorandum decision and order from cases in the District of Utah wherein ReconTrust continued to prosecute actions against Utah homeowners as late as December 2011 and February 2012.[33] There was no specific representation that ReconTrust would comply with the Utah statutes in the future It is of course

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[29](continued)
as to whether the district court's judgment denying the IRS application was a final decision even though the petitioner's business successor-in-interest had already voluntarily paid all the taxes, penalties, and interest of taxpayer Carlson)

[30](Defs ' Supplemental Mem Supp Mot Dismiss, filed Dec 1, 2011 ("Defs.' Supplemental Mem ") (dkt no 83), at 8)

[31](*Id*)

[32]Utah Code Ann § 57-1-22(1)(a) (2010) (emphasis added)

[33]*Dutcher v Matheson*, 2 11-CV-666-TS (D Utah Feb 8, 2012) (Mem Opinion & Order, dkt no 48), *see also Garrett v ReconTrust Co , N A* , 2 11-CV-00763-DS (D Utah Dec 21, 2011) (Order, dkt no 9)

curious that ReconTrust later provided to the court supplemental authority and further argued that ReconTrust did not have to comply with the Utah statutes. Thus, it is not absolutely clear to this court that ReconTrust's future compliance with Utah statutes can reasonably be expected.

ReconTrust relies on two decisions which apply Texas law to a national bank's fiduciary activities in Utah.[34] The cases on this issue within the District of Utah are evenly split.[35] One of them was appealed.[36] The Tenth Circuit did not have opportunity to pass on the matter because the plaintiff voluntarily dismissed her complaint in the underlying action prior to the Tenth Circuit having opportunity to issue an opinion.[37]

The substitution of an attorney as successor trustee occurred on November 2, 2011. The hearing on the motion to dismiss was set for November 10, 2011. Despite having eight days (four days, not including weekends and the dates of substitution and hearing) to notify the court of the substitution—and possibly submit a supplemental brief as to the potential mootness

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[34]*Dutcher v. Matheson*, 2:11-CV-666-TS (D. Utah Feb. 8, 2012) (Mem. Opinion & Order, dkt. no. 48); *see also Garrett v. ReconTrust Co., N.A.*, 2:11-CV-00763-DS (D. Utah Dec. 21, 2011) (Order, dkt. no. 9).

[35]Just as there are two District of Utah cases that apply Texas law to ReconTrust's foreclosure operations in Utah, *see* cases cited *supra* note 34, there are also two District of Utah cases that apply Utah law on the same issue. *See Cox v. ReconTrust Co.*, No. 2:10-CV-492-CW, 2011 WL 835893, at *6 (D. Utah March 3, 2011) (holding that Utah law applies to ReconTrust's foreclosure activities within the State of Utah); *see also Coleman v. ReconTrust Co.*, No. 2:10-CV-1099 (D. Utah Oct. 3, 2011) (Order Granting in Part and Denying in Part Motion to Dismiss, dkt. no. 87, at 2) (same).

[36]*See Cox v. ReconTrust Co.*, No. 2:10-CV-492-CW (D. Utah June 25, 2010) (Notice of Appeal of Interlocutory Decision, dkt. no. 47).

[37]*See Cox v. ReconTrust Co., N.A.*, No. 10-4117, Order at 2 (10th Cir. Aug. 18, 2011).

issue—defendants did not notify the court of the substitution until the November 10, 2011 hearing was well underway and 245[38] days after the case was commenced.[39]

The parties have raised a compelling question. Further, the private rights of many Utah citizens are potentially involved. The matter is too important to be denied effective review.

B. ReconTrust is not authorized to exercise a power of sale in a non-judicial foreclosure action within the State of Utah

Utah statutes require banks—including Utah-chartered banks—to foreclose trust deeds only through identified trustees. The question for decision is direct: Does ReconTrust, a Texas corporation, and by definition a "national bank"—although it neither takes deposits nor makes loans—have the power to conduct non-judicial foreclosures in Utah of trust deeds on real property located in Utah without complying with Utah statutes? The direct answer is no. It does not have such power.

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[38]Plaintiffs filed their complaint in Third District Court, Salt Lake County, Utah on March 11, 2011.

[39](*See* Mot. Dismiss Hr'g Tr. at 7:16–24, 33:12–23):
MS. MILLER: In any event, a new substitution of trustee has been made since that time identifying another trustee. . . .
THE COURT: When was that done?
MS. MILLER: That was done in November of 2011.
THE COURT: Just a day or two ago.
MS. MILLER: A week or two ago, yes.
. . . .
MS. MILLER: We'd also like to point out that there is no immediate or irreparable injury in this case. ReconTrust is not even the appointed substitute trustee anymore, as we pointed out earlier, so the issue is moot—
THE COURT: Why so fast? I notice that you did that on the 2d of November.
MS. MILLER: Yes.
THE COURT: Okay.
MS. MILLER: Yes. The old notice was stale. We would not have been able to act on the old notice. And so a new notice was issued.

A state bank which seeks to foreclose on real property in Utah must comply with Utah law. A federally chartered "bank" which seeks to foreclose on such property must comply with Utah law as well. The reason is found within the federal statutes, the history of federal legislation, as well as principles of Federalism.

Defendants—and the court decisions to which they cite[40]—rely heavily on 12 C.F.R. § 9.7(d) (2011), a final interpretive rule issued by the Office of the Comptroller of the Currency ("the Comptroller") which interprets the governing federal statute, 12 U.S.C.A. § 92a (2001). However, none of the decisions to which defendants cite—nor any that this court has examined—have questioned whether the Comptroller's interpretation deserves deference.[41]

In determining whether the court should give such deference to the Comptroller's interpretation of § 92a of the National Bank Act the court applies the *Chevron* test, which states that

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

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[40] *Dutcher v. Matheson*, 2:11-CV-666-TS (D. Utah Feb. 8, 2012) (Mem. Opinion & Order, dkt. no. 48); *see also Garrett v. ReconTrust Co., N.A.*, 2:11-CV-00763-DS (D. Utah Dec. 21, 2011) (Order, dkt. no. 9). Both the preceding cases held that Texas law applies to ReconTrust's foreclosure activities in Utah. *But see Cox v. ReconTrust Co.*, No. 2:10-CV-492-CW, 2011 WL 835893, at *6 (D. Utah March 3, 2011) (holding that Utah law applies to ReconTrust's foreclosure activities within the State of Utah); *see also Coleman v. ReconTrust Co.*, No. 2:10-CV-1099 (D. Utah Oct. 3, 2011) (Order Granting in Part and Denying in Part Motion to Dismiss, dkt. no. 87, at 2) (same).

[41] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

> question for the court is whether the agency's answer is based on a permissible construction of the statute.[42]

In a more recent case, the Supreme Court has stated that "[u]nder the familiar *Chevron* framework, we defer to an agency's *reasonable* interpretation of a statute it is charged with administering."[43]

Accordingly, in determining whether the Comptroller's opinion deserves deference, the court first looks to whether Congress has addressed the precise question at issue, and if Congress has not, the court will then determine whether the Comptroller's interpretation is based on a permissible construction of the statute, i.e., whether the interpretation is reasonable.

1. The interplay between 12 U.S.C. § 92a and 12 C.F.R. § 9.7(d)

ReconTrust is chartered as a "national bank," and is governed by the National Bank Act, 12 U.S.C. § 1 *et seq.* As part of the National Bank Act, 12 U.S.C. § 92a specifically discusses a national bank's power to act as trustee. Because the Comptroller's final rule purports to interpret 12 U.S.C. § 92a, this court's starting point is the plain language of the statute itself. Pertinent also is the intent of Congress as reflected in the language of the statute and its legislative history.

The statute states:

> **(a) Authority of Comptroller of the Currency**
>
> The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, *when not in contravention of State or local law*, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> **(b) Grant and exercise of powers deemed not in contravention of State or local law**

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[42] *Id.* at 842–43.

[43] *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009) (emphasis added).

> Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.[44]

Congress has spoken directly to this issue: the "State" referenced in § 92a refers, *inter alia*, to the State where the trust activity occurs—Utah in this case. The statute is clear. However, even if the statute is not clear and demands interpretation, this Court concludes that the Comptroller's interpretation in 12 C.F.R. § 9.7(d) modifies the statute and is unreasonable—if not irrational—and therefore, does not deserve deference. ReconTrust must comply with Utah law when engaging in trust activities within the State of Utah, which includes trust deed foreclosures. This court further concludes that ReconTrust, by definition a national bank, competes with banks, not title insurance companies. Rather, the Utah Legislature intended that title insurance companies and national or state-chartered banks work in concert with each other when conducting non-judicial foreclosures within the State of Utah.

Defendants argue that § 92a must be read in conjunction with 12 C.F.R. § 9.7(d) (2011), which states that

> [f]or each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.[45]

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[44] 12 U.S.C.A. § 92a(a)–(b) (2001) (emphasis added).

[45] 12 C.F.R. § 9.7(d) (2011).

Defendants assert that when read in conjunction with 12 C.F.R. § 9.7(d), the "State or local law" referred to in 12 U.S.C. § 92a(a) is clearly Texas law—as opposed to Utah law—because ReconTrust accepts fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets in Texas. Defendants have called the court's attention to two recent decisions—both within the District of Utah—which arrive at this conclusion, relying on 12 C.F.R. § 9.7(d).[46] Although aware of these decisions, this court sees the issue differently.

Texas law allows national banks to act as trustee under deeds of trust, and to exercise the power of sale with regard to such deeds of trust in Texas.[47] Utah law does not.[48] Because Texas law allows its own state-chartered banks to exercise the power of sale in foreclosure actions in Texas, pursuant to 12 U.S.C. § 92a, national banks are also allowed to exercise the power of sale within Texas. However, because Utah law does not allow Utah state-chartered banks to exercise the power of sale in foreclosure actions, plaintiffs argue that § 92a's contravention clause ("when not in contravention of State or local law") also prohibits national banks from exercising the power of sale in Utah.

The threshold issue is whether the court should give credence to 12 C.F.R. § 9.7(d)'s reading of 12 U.S.C. § 92a, as the defendants insist.

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[46] *Dutcher v. Matheson*, 2:11-CV-666-TS (D. Utah Feb. 8, 2012) (Mem. Decision & Order, dkt. no. 48, at 11 n.25); *see also Garrett v. ReconTrust Co., N.A.*, 2:11-CV-00763-DS (D. Utah Dec. 21, 2011) (Order, dkt. no. 9, at 3).

[47] *See* Tex. Fin. Code Ann. §§ 32.001, 182.001; *see also* Tex. Prop. Code Ann. §§ 51.0001, 51.0074.

[48] *See* Utah Code Ann. §§ 57-1-23, 57-1-21 (2010) (allowing only an active member of the Utah State Bar or a title insurance company to exercise the power of sale).

(a) Whether Congress has directly spoken to the precise question at issue

The precise question at issue is this: to which "State(s)" does 12 U.S.C. § 92a(a) refer? After carefully examining the statute's plain meaning, together with the legislative history of the statute, the court has determined that Congress has directly addressed this precise question.

The court begins its analysis by looking to the plain meaning of the statute.[49] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[50] 12 U.S.C. § 92a(a) sets forth the Comptroller's authority to grant national banks the power to act as trustee "when not in contravention of State or local law." The State law to which § 92a(a) refers is the law "of the State in which the national bank is located."[51] Subsection (b) further states that "whenever the laws of such State authorize" State banks to act as trustee, the granting of such trustee powers to national banks "shall not be deemed to be in contravention of State or local law."[52]

The statute's plain meaning indicates that the national bank is "located" in each state in which it carries on activities as trustee.

The Comptroller's rule—without providing reasons therefor—limits its interpretation of the location where a national bank acts as trustee to the State in which the bank performs its

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[49]*Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989))).

[50]*Robinson*, 519 U.S. at 341.

[51]12 U.S.C.A. § 92a(a) (2001).

[52]*Id.* § 92a(b).

"core fiduciary functions."[53] The Comptroller has interpreted "core fiduciary functions" to mean "accept[ing] the fiduciary appointment, execut[ing] the documents that create the fiduciary relationship, and mak[ing] discretionary decisions regarding the investment or distribution of fiduciary assets."[54] Notably, the Comptroller failed to include as a core fiduciary function engaging in an act which liquidates the trust assets, e.g., engaging in a non-judicial foreclosure of real property where the trust asset is located. This makes no sense

Such an artificial exclusion contravenes the plain meaning of the statute. When acting as a trustee of a trust deed, one necessarily acts in the capacity as trustee in the State where the real property is located, where notice of default is filed, and where the sale is conducted. In this case, ReconTrust is acting as trustee of a trust deed for real property in the State of Utah. ReconTrust, as trustee, filed a notice of default and election to foreclose on real property within the State of Utah.

The notice is filed in Utah. The sale is conducted in Utah, often on the steps of the local county courthouse. Those acts do not occur in Texas. Those acts may not be performed by Utah-chartered banks. Thus, those acts may not be performed by national banks in Utah. That dual system, it seems to me, is Federalism at its most elementary.

Other courts have also reached this conclusion. In *Cox v. ReconTrust Co., N.A.*,[55] the court stated that it was not convinced by

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[53]*See* Interpretive Letter No. 866, 1999 WL 983923, at Part II.B. (October 8, 1999).

[54]12 C.F.R. § 9.7(d) (2011); *see also* Interpretive Letter No. 866, 1999 WL 983923, at Part II.B. (adopted in substance by 12 C.F.R. § 9.7(d)).

[55]No. 2:10-CV-492 CW, 2011 WL 835893, at *6 (D. Utah March 3, 2011). Plaintiff voluntarily dismissed the underlying district court action while the foregoing case was on appeal before the Tenth Circuit. Thus, the Tenth Circuit found that the appeal was rendered moot. *Cox v. ReconTrust Co., N.A.*, No. 10-4117, Order at 2 (10th Cir. Aug. 18, 2011). Currently, this case and the companion Utah cases all are a form of repetition.

> ReconTrust's argument that § 92a(b) dictates that the court look to some state law other than Utah state law to evaluate ReconTrust's foreclosure activities in Utah. . . . Here, . . . ReconTrust is conducting foreclosure activities on behalf of Bank of America in several states, including Utah. . . .
>
> Under a straight forward reading of § 92a(b), this court must look to Utah law in its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers. The powers granted to ReconTrust under federal law in this case are limited by the powers granted by Utah state law to ReconTrust's competitors. Accordingly, the extent of ReconTrust's federal powers must be determined by reference to the laws of Utah, not by reference to the laws of some other state. Under Utah law, the power to conduct non-judicial foreclosure is limited to attorneys and title companies. The scope of the powers granted by federal law is limited to the same power Utah statute confers on ReconTrust's Utah competitors. . . .[56]

The legislative history of 12 U.S.C. § 92a demonstrates that Utah law should apply.

The phrase, "when not in contravention of State or local law" originated with § 11(k) of the Federal Reserve Act of 1913.[57] Although legislative history does not exist as to the precise meaning of the phrase in § 11(k), a nearly identical phrase was used in § 8 of the same Act. Section 8 provided a means by which state banks could convert to national banks. However, the section placed a condition on state banks that desired to convert to national banks: "*Provided, however,* That said conversion shall not be in contravention of the State law."[58] When the bill which eventually became the Federal Reserve Act of 1913 was introduced on the floor of the Senate on December 1, 1913, § 8 also contained the word "local" so as to read, "*Provided,*

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[56]*Id.*; *see also Coleman v. ReconTrust Co.*, No. 2:10-CV-1099 (D. Utah Oct. 3, 2011) (Order Granting in Part and Denying in Part Motion to Dismiss, dkt. no. 87, at 2) ("[T]he court agrees with the reasoning applied in *Cox v. ReconTrust Company, N.A.*, 2011 WL 835893 (March 3, 2011 D. Utah).").

[57]Federal Reserve Act of 1913, Dec. 23, 1913, ch. 6 § 11(k), 38 Stat. 262. At the time of its passage, section 11(k) stated that "[t]he Federal Reserve Board shall be authorized and empowered To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

[58]*Id.* § 8, 38 Stat. 258.

however, That said acts are not in contravention of the State or local law."[59] That wording of § 8 is almost identical to the language found in § 11(k) that now exists as 12 U.S.C. § 92a(a).

Dialogue as to the purpose of this language that occurred on the floor of the Senate on December 15, 1913 proves instructive:

> MR. BURTON: On page 28, lines 6 and 7, there is this proviso: *Provided, however*, That said acts are not in contravention of the State or local law.
>
> Why should this reservation appear in the preceding section and not in section 9? The preceding section pertains to a change in the form of organization from a State bank to a national bank, while this section, as I have already said, relates to membership by a State bank in this new system. Why is not a reservation of that kind equally as necessary in this section as in the preceding section?
>
> MR. OWEN: Mr. President, I will reply to the Senator that, in my judgment, it is not necessary in the preceding section.
>
> MR. BURTON: That is, it goes without saying?
>
> MR. OWEN: It is merely put in as a courteous observation. In reality I do not think it is actually necessary, because no State bank having its charter under a State law could violate the law of its own being. *It was thought well, however, to put it in to show that there was no purpose on the part of Congress to disregard the local State law, but merely to give its assent provided the State law permitted it to be done.*[60]

Senator Owen's[61] response is a clear indication that Congress did not intend to disregard or contravene *local* State law when giving state banks the opportunity to convert to national banks. That is to say, if State law prohibited a state bank from converting to a national bank, the

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[59] 51 Cong. Rec. S23 (December 1, 1913) (statement of Sen. Owen).

[60] 51 Cong. Rec. S879 (December 15, 1913) (statements of Sens. Owen & Burton) (emphasis added).

[61] Senator Owen was the Senate's principal sponsor of the Federal Reserve Act of 1913.

Federal Reserve Act would not contravene that State's law, and the state bank would not be able to convert to a national bank.

In light of the near-identical nature of the phrases in §§ 8 and 11(k), it seems clear that Congress intended to preclude any inference that a national bank may disregard local State law in performing its duties as trustee. A contrary interpretation draws precisely that inference and effectively preempts the laws of the local State (presumably the State where the foreclosed property is located and the trustee executes the power of sale) in favor of the laws of another State (the State where the national bank performs its "core fiduciary functions"); this is essentially the effect of the Comptroller's final rule.

Shortly after the enactment of the Federal Reserve Act of 1913, the Supreme Court had opportunity to interpret § 11(k) when the Michigan Supreme Court upheld a state law that prohibited national banks from exercising trust powers within Michigan.[62] Interestingly, the laws of Michigan allowed state banks to exercise trust powers;[63] thus the effect of the Michigan law was to discriminate against national banks. The Supreme Court reversed the decision of the Michigan Supreme Court,[64] holding that if State law allows a state bank to conduct certain business, the State must also allow a national bank to conduct that same business so long as the Federal Reserve Board grants the national bank permission to do so.[65]

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[62] *First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 421–22 (1917).

[63] *Id.* at 421.

[64] *Id.* at 423–24.

[65] *Id.* at 426.

The next year, Congress successfully codified the Supreme Court's holding in *Fellows* by passing H.R. 11283,[66] which in present-day form comprises the latter-half of subsection 92a(a) and the entirety of subsection (b). Prior to the passage of H.R. 11283, the House Committee on Banking and Currency's report regarding the bill stated that

> [u]nder a recent decision of the United States Supreme Court it is clearly settled that Congress has the power to confer authority upon national banks to act in these fiduciary capacities, where such powers are exercised by trust companies, State banks, or other competing corporations, even though the State law discriminates against national banks in this regard. The terms of section 11(k) are extended, therefore, to permit such powers to be granted to national banks in those States in which the State law discriminates against national banks in this respect.[67]

Congress thus intended to create an equal playing field for national banks, and was wary of any potential competitive advantage afforded to State institutions by State law.

Decades later, through the passage of the National Bank Act of 1962, Congress removed the power originally vested in the Federal Reserve Board under § 11(k) and transferred it to the Comptroller of the Currency.[68] This Act of Congress effectively repealed[69] the language of § 11(k) of the Federal Reserve Act and reenacted it as 12 U.S.C. § 92a(a)–(b). On September 13, 1962, the Senate Committee on Banking and Currency issued Senate Report No. 2039, urging the

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[66]Act of Sept. 26, 1918, ch. 177, 40 Stat. 967, 968–69 (1918).

[67]H.R. Rep. No. 65-479, *reprinted in* U.S. Serial Set vol. 7307 (1918).

[68]National Bank Act of 1962, Pub. L. No. 87-722, 76 Stat. 668 (enacting H.R.12577).

[69]"Subsection (k) of section 11 of the Federal Reserve Act . . . is repealed by [H.R. 12577] in a purely technical sense only. In effect, the provisions of that subsection become the first section of the bill, with the Comptroller of the Currency being substituted for the Board of Governors of the Federal Reserve System as the responsible administrative agency." H.R. Rep. No. 87-2255, at 4, *reprinted in* U.S. Serial Set vol. 12433 (1962).

passage of the National Bank Act of 1962.[70] Therein, the committee included a "General Statement" which made abundantly clear that

> this bill will result in no change in the present distribution of power between Federal and State Governments, nor will it cause any weakening of the principles underlying the dual banking system. . . . It would not give authority to the Comptroller of the Currency to exercise any supervisory functions over State banks.[71]

The Office of the Comptroller of the Currency defines "dual banking system" as

> parallel state and federal banking systems that co-exist in the United States. The federal system is based on a federal bank charter, powers defined under federal law, operation under federal standards, and oversight by a federal supervisor. The state system is characterized by state chartering, bank powers established under state law, and operation under state standards, including oversight by state supervisors.[72]

Therefore, when the plain language of § 92a is read in conjunction with the legislative history of the contravention clause, it is certain that Congress did not intend the laws of one State to pre-empt the laws of another State in dealing with a national bank. Rather, Congress made abundantly clear that "there was no purpose on the part of Congress to disregard the local State law, but merely to give its assent provided the State law permitted it to be done."[73] In light of the foregoing, this court determines that Congress has spoken to the precise question at issue, and has determined that the law that shall apply to a national bank acting as trustee under a trust deed is the local State law, which in this instance is Utah law.

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[70]S. Rep. No. 87-2039, *reprinted in* 1962 U.S.C.C.A.N. 2735–36; *see also* H.R. Rep. No. 87-2255, *reprinted in* U.S. Serial Set vol. 12433 (1962) (adopted in substance by S. Rep. No. 87-2039 and referenced in 1962 U.S.C.C.A.N. 2735–36).

[71]*Id.* at 2736.

[72]Office of the Comptroller of the Currency, *National Banks and the Dual Banking System* 1 (September 2003), *at* http://www.occ.gov/static/publications/DualBanking.pdf.

[73]51 Cong. Rec. S879 (December 15, 1913) (statement of Sen. Owen).

(b) Whether the Comptroller's interpretation is reasonable (in the event that the statute is silent or ambiguous)

Although the reasonableness of the Comptroller's interpretation need only be addressed if Congress has not previously spoken as to the precise question at issue, which it has, for the sake of completeness, the court will also examine the reasonableness of the Comptroller's interpretation found in 12 C.F.R. § 9.7(d).

The Comptroller is charged with interpreting the statute in a reasonable manner. It is not charged with amending the law. The Supreme Court has stated in regards to 12 U.S.C. § 92a(a) that "[n]ot surprisingly, this Court has interpreted those explicit provisions to mean what they say."[74] If § 92a is to mean what it says (i.e., the plain meaning), the reference to "State or local law"at a minimum should be construed to mean the State in which the trust activity occurs.

With the legislative history of § 92a in mind, it is important to note that the Comptroller was not always a proponent of the interpretation found in 12 C.F.R. § 9.7(d). Indeed, in large part, the Comptroller based 12 C.F.R. § 9.7(d) on two interpretive letters issued in October 1999.[75] But rarely mentioned in this rulemaking is the Comptroller's Interpretive Letter No. 695, which issued in December 1995.[76]

The Comptroller issued Interpretive Letter No. 695 in response to a national bank's inquiry as to whether the national bank had authority to conduct fiduciary activities on a nationwide basis through trust offices in various states.[77] Therein, the Comptroller stated that

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[74]*Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 34 (1996).

[75]Interpretive Letter No. 866, 1999 WL 983923 (October 8, 1999); Interpretive Letter No. 872, 1999 WL 1251391 (October 28, 1999).

[76]Interpretive Letter No. 695, 1996 WL 187825 (December 8, 1995).

[77]*Id.* at *1.

> the effect of section 92a is that in any specific state, the availability of fiduciary powers is the same for out-of-state national banks or for in-state national banks and is dependent upon what the state permits for its own state institutions. A state may limit national banks from exercising any or all fiduciary powers in that state, but only if it also bars its own institutions from exercising the same powers. Therefore, a national bank with its main office in one state (such as the proposed trust bank) may conduct fiduciary business in that state and other states, depending upon - *with respect to each state - whether each state allows its own institutions to engage in fiduciary business.*[78]

This interpretation is certainly reasonable as it—consistent with Congress' intent—precludes a competitive advantage as between state-chartered banks and national banks. Such an interpretation also precludes a competitive advantage between in-state national banks and out-of-state national banks. This principle was further emphasized by the Comptroller in Letter No. 695:

> This interpretation of the statute also fosters desirable public policies. First, every national bank offering fiduciary services in a given state will have the same authority to conduct fiduciary business. A national bank conducting fiduciary business and administering trust assets at a trust office will be subject to the same standards irrespective of whether the office is part of an in-state national bank or an out-of-state national bank. Second, there will be a *level playing field for enhanced competition in the provision of fiduciary services within each state, because more potential providers will be able to compete on similar terms.*[79]

This means that a national bank based in Texas which performs fiduciary functions in Utah cannot have a competitive advantage over a Utah-based national bank that performs its fiduciary functions in Utah. However, under the Comptroller's final rule, a national bank based in Texas does have a competitive advantage over a national bank based in Utah as well as Utah-chartered banks. Such a result is simply contrary to Congress' clear intent in enacting § 92a.

The Comptroller further stated that

> section 92a authorizes national banks to offer fiduciary services in multiple states, but then conditions the exercise of that power within each state *on a state-by-state basis* under the same test: is the exercise of fiduciary powers by national banks

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[78] *Id.* at *4 (emphasis added).

[79] *Id.* at *14 (emphasis added).

> prohibited by state law, and even if it is, does that state permit its state institutions to exercise these powers or not. *This result is consistent with other banking statutes that treat a single national bank as present in different states for the purposes of that statute.*[80]

The Comptroller cited various cases to support its position that "for the purposes of these statutes, a national bank is not located only in the place of its main office but can be 'located,' 'situated' or 'existing' in, or be a 'citizen' of, multiple cities, counties, or states."[81] Therefore, in light of Interpretive Letter No. 695, it seems unreasonable, if not irrational, for the Comptroller to now posit that a national bank is only "located" in the place where it conducts "core fiduciary activities."[82]

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[80] *Id.* at *12 (emphasis added).

[81] *Id.* at *13 (citing *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 44 (1977); *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255 (8th Cir.1977); *Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Seattle Trust & Sav. Bank v. Bank of Cal. N.A.*, 492 F.2d 48 (9th Cir. 1974), *cert. denied*, 419 U.S. 844 (1974); *Bank of N.Y. v. Bank of Am.*, 853 F. Supp. 736 (S.D.N.Y. 1994); *Conn. Nat'l Bank v. Iacono*, 785 F. Supp. 30 (D.R.I. 1992)).

[82] The Supreme Court in *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009), held that the Comptroller's interpretation of another portion of the National Bank Act—12 U.S.C. § 484(a)—was unreasonable. *See id.* at 2719 ("The Comptroller's regulation, therefore, does not comport with the statute. Neither does the Comptroller's interpretation of its regulation . . . .").

12 U.S.C. § 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."

In *Cuomo*, the Comptroller interpreted the statute in a way that would have prohibited the New York Attorney General from obtaining records from national banks to determine if the national banks were complying with state fair-lending laws. *See Cuomo*, 129 S. Ct. at 2714.

ReconTrust relies on two other interpretive letters[83] issued by the Comptroller. Those letters were issued nearly four years after Interpretive Letter No. 695 and ostensibly provide the foundation for the Comptroller's issuance of 12 C.F.R. § 9.7.[84] Seemingly contradicting the plain meaning of § 92a's contravention clause as well as Interpretive Letter No. 695, the Comptroller in Interpretive Letter No. 866, stated that the location of a national bank is not determined by the location where the trust assets are located,[85] but rather, where the bank acts in a fiduciary capacity.[86] The Comptroller determined that a bank "acts in a fiduciary capacity" where it reviews proposed trust appointments, executes trust agreements, and makes discretionary decisions about the investment or distribution of trust assets.[87] To then say that a bank does not "act in a fiduciary capacity" when it exercises the trustee's power of sale and does so in Utah is fantasy.

Indeed, how the Comptroller decided to limit the above-listed activities as a trustee's core fiduciary functions, excluding the liquidation or disposal of trust assets, is nowhere explained.

The Comptroller, after issuing an interpretive letter (No. 695) true to the statute's plain meaning and Congress' apparent intent as evinced by Senator Owens' statement in 1913, and Congress' subsequent acts (and corresponding statements) in 1918 and 1962, reversed its

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[83] *See supra* note 75. Twenty days subsequent to the issuance of Letter No. 866, the Comptroller issued Letter No. 872. The pertinent portion of the Comptroller's analysis in Letter No. 872 is taken verbatim from Letter No. 866, and as such, the court need not separately discuss the substance of Letter No. 872.

[84] *See* 66 Fed. Reg. 34,792-01, 2001 WL 731641, at *34795 (July 2, 2001) ("These conclusions are consistent with the conclusions set out in IL 866 and IL 872.").

[85] *See* 1999 WL 983923, at Part II.B.

[86] *See id.*

[87] *See id.* at Part II.C.

interpretation of the statute to now posit that the State law referred to in § 92a is solely that of the State where the trustee accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets.

Interestingly, Letter Nos. 866 and 872 also contradict the view expressed in an article[88] co-authored by John D. Hawke, Jr.,[89] which was written prior to Mr. Hawke's appointment as the Comptroller. Mr. Hawke wrote in pertinent part:

> Section 92a specifically provides for deference to state law in defining the powers of a national bank to act as a fiduciary, and does not operate as a grant of authority to create federal common law. Section 92a authorizes the Comptroller to grant to national banks the right to act as trustee and "in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." On its face, section 92a is geared to principles of state law. Congress has specifically designated the scope of a national bank's trust powers to be coextensive with the trust powers of state banks in the state where the bank is located. *Because the trust powers of state banks vary from state to state, so too do the trust powers of national banks.*
>
> The statutory objective is to attain competitive equality between national banks and their state-chartered counterparts in the exercise of trust powers. *Congress clearly intended national banks acting as trustees in a given state to have the same rights and duties as local state banks.*[90]

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[88]John D. Hawke, Jr., Melanie L. Fein & David F. Freeman, Jr., *The Authority of National Banks to Invest Trust Assets in Bank-advised Mutual Funds*, 10 Ann. Rev. Banking L. 131 (1991).

[89]According to the Comptroller's website, Mr. Hawke served as the Comptroller of the Currency from 1998 to 2004, which encompasses the October 1999 publication of Letter Nos. 866 and 872, *see* http://www.occ.treas.gov/about/who-we-are/leadership/past-comptrollers/comptroller-john-hawke.html (last visited Mar. 13, 2012).

[90]Hawke, Fein & Freeman, *supra* note 88, at 140 (internal citations omitted) (emphasis added).

Mr. Hawke authored this passage prior to his appointment as Comptroller, and therefore, the above-excerpt was not written while serving in his official capacity. However, Mr. Hawke's analysis strikes the court as reasonable and in line with § 92a's plain meaning and Congress' intent, whereas the final rule promulgated by the Comptroller does not. Moreover, nothing in the final rule explains why the final rule is preferable—let alone reasonable—to the interpretive approach taken in the above-quoted passage and in Interpretive Letter No. 695.

The Comptroller has conceded that "national banks are [not] divorced from the standards of state law in all respects."[91] Indeed, the Comptroller, in quoting the Supreme Court,[92] stated that

> national banks are "subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. *Their acquisition and transfer of property, their right to collect their debts*, and their liability to be sued for debts, *are all based on state law*."[93]

Certainly a national bank concerns itself with the acquisition and transfer of property, and its right to collect debts—which are both governed and construed by State law[94]—when it acts as successor trustee on a deed of real property, and attempts to foreclose the same through a nonjudicial foreclosure sale.

In sum, the national statutes which created a dual banking system operate to deny out-of-state national banks any competitive advantage over local, state-chartered banks or in-state

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[91]Office of the Comptroller of the Currency, *National Banks and the Dual Banking System* 26 (September 2003), *at* http://www.occ.gov/static/publications/DualBanking.pdf.

[92]*Nat'l Bank v. Commonwealth*, 76 U.S. 353 (1869) (emphasis added).

[93]*Id.* at 362; *see also* Office of the Comptroller of the Currency, *National Banks and the Dual Banking System* 27 (September 2003), *at* http://www.occ.gov/static/publications/DualBanking.pdf (quoting *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002)).

[94]*See Nat'l Bank v. Commonwealth*, 76 U.S. at 362.

national banks. Such was and is the will of Congress as expressed in statutory language and legislative history, both consistent with the principles of Federalism, as reflected in the Tenth Amendment of the Constitution.

The Comptroller's interpretation of § 92a, as set forth in 12 C.F.R. § 9.7(d), modifies the statute and gives out-of-state national banks a sizeable competitive advantage over their state-chartered counterparts and in-state national banks in states—such as Utah—where state-chartered banks and in-state national banks are not allowed to perform certain fiduciary functions, namely exercising the power of sale in non-judicial trust deed foreclosures.

Thus, 12 C.F.R. § 9.7(d) does not justify the deference contemplated in *Chevron* for agency construction of pertinent statutes.

There are fifty States. Each has its own legislature and each its own set of laws relating to state-chartered banks. Texas does not pass Utah banking laws. Utah does not pass Texas banking laws. Utah banks are limited by Utah laws as to the manner of conducting non-judicial foreclosures of real property. National statutes have recognized that local laws have a role to play in a dual banking system and have done so from at least 1913, when the Federal Reserve Act was passed and predecessor language was first installed in that Act.

2. The competition clause of 12 U.S.C. § 92a

12 U.S.C. § 92a(a) permits the Comptroller to grant a national bank the power to act in any fiduciary capacity that a state bank, corporation or organization "which come[s] into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

Driving the point home, Congress also enacted subsection (b), which provides that

> [w]henever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations *which compete with national banks*, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.[95]

The Supreme Court had an opportunity to examine the statute in *Burnes Nat'l Bank v. Duncan*,[96] wherein Justice Holmes opined that the foregoing passages state "in a roundabout and polite but unmistakable way that whatever may be the State law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power."[97] The holding in *Burnes Nat'l Bank* also applies to national banks who wish to act as trustees so long as competing State institutions also act as trustees.

This is of no help to ReconTrust, a subsidiary of a national bank. It is not in competition with a bar member. It is not in competition with a title insurance company. Indeed, the statutes prohibit a bank from engaging in title insurance activity.[98]

Utah Code Ann. §§ 57-1-21, 57-1-23.5 were both drafted so that the fiduciaries contemplated in 12 U.S.C. § 92a (including both state banks and national banks acting as trustees) would have to work in concert with—not in competition with—title insurance companies and active members of the State bar. Indeed, a state or national bank, acting as trustee, must procure the services of either an active member of the State bar or title insurance company in order to comply with the Utah law.

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[95]12 U.S.C. § 92a(b) (emphasis added).

[96]265 U.S. 17 (1924).

[97]*Id.* at 23.

[98]15 U.S.C.A. § 6713(a) (2009) ("No national bank may engage in any activity involving the under-writing or sale of title insurance.").

Banks compete with banks. Indeed, ReconTrust's status is by definition that of a national bank, and in this specialized and limited area of trust activity, it, like all banks must comply with local law.

III. CONCLUSION

In light of the foregoing, plaintiffs' claim for declaratory relief under Utah Code Ann. § 57-1-23.5 satisfies the standards set forth in *Twombly* and *Iqbal*.

Because of ReconTrust's lack of authority to exercise the power of sale in a non-judicial foreclosure action within Utah,

IT IS ORDERED that defendants' motion to dismiss is hereby **DENIED**.

DATED this 15th day of March, 2012.

BY THE COURT:

BRUCE S. JENKINS
United States Senior District Judge

ADDENDUM 4

OCC Rule 9.7 (12 C.F.R. § 9.7)

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 12. Banks and Banking
Chapter I. Comptroller of the Currency, Department of the Treasury
Part 9. Fiduciary Activities of National Banks (Refs & Annos)
Regulations
→ § 9.7 Multi-state fiduciary operations.

(a) Acting in a fiduciary capacity in more than one state. Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) Serving customers in other states. While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) Offices in more than one state. A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) Determination of the state referred to in 12 U.S.C. 92a. For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) Application of state law--

(1) State laws used in section 92a. The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) Other state laws. Except for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

[66 FR 34798, July 2, 2001]

SOURCE: 61 FR 68554, Dec. 30, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 24 (Seventh), 92a, and

ADDENDUM 5

OCC Statement of Basis and Purpose accompanying
Rule 9.7 (66 FR 34792-01, 2001 WL 731641)

Westlaw.
66 FR 34792-01, 2001 WL 731641 (F.R.)

RULES and REGULATIONS

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 5 and 9

[Docket No. 01-14]

RIN 1557-AB79

Fiduciary Activities of National Banks

Monday, July 2, 2001

*34792 AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing its final rule regarding the authority and standards for national banks to conduct multi-state trust operations. The purpose of these changes is to provide enhanced guidance to national banks engaging in fiduciary activities.

EFFECTIVE DATE: August 1, 2001.

FOR FURTHER INFORMATION CONTACT: Lisa Lintecum, Director, or Joel Miller, Senior Advisor, Asset Management, (202) 874-4447; Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874-5300; Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; or William Dehnke, Assistant Director, Securities and Corporate Practices Division, (202) 874-5210.

SUPPLEMENTARY INFORMATION: On December 5, 2000, the OCC published a notice of proposed rulemaking (NPRM) in the Federal Register (65 FR 75872) to amend 12 CFR part 9 to add provisions addressing the application of 12 U.S.C. 92a in the context of a national bank engaging in fiduciary activities in more than one state. The purpose of the rulemaking was to provide clarity and certainty for national banks' multi-state fiduciary activities. The standards contained in the NPRM reflected positions taken in three earlier OCC Interpretive Letters.[FN1] Interpretive Letter No. 695 found that a national bank authorized to engage in fiduciary activities may act in a fiduciary capacity in any state that permits its own in-state fiduciaries to act in that capacity, including at trust offices. Interpretive Letters Nos. 866 and 872 clarified that a national bank that acts in a fiduciary capacity in one state may market its fiduciary services to customers in other states, solicit business from them, and act as fiduciary for customers located in other states. The NPRM and the final rule are based upon the detailed analysis contained in these Interpretive Letters.

FN1 OCC Interpretive Letter No. 872 (Oct. 28, 1999) reprinted in [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) 81-366 (IL 872); OCC Interpretive Letter No. 866 (Oct. 8, 1999) reprinted in (1999-2000 Transfer Binder] Fed.

Banking L. Rep. (CCH) 81-360 (IL 866); and OCC Interpretive Letter No. 695 (Dec. 8, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) 81-010 (IL 695).

Along with the NPRM, we also published an advance notice of proposed rulemaking (ANPR) inviting comments on whether the OCC should establish uniform national standards for the conduct of fiduciary activities by national banks. The ANPR invited comments on whether uniform standards of care generally applicable to national bank trustees' administration of private trusts and investment of private trust property should be established.

We received comments on both the NPRM and the ANPR. As discussed further below, comments on the NPRM predominantly were favorable. Comments on the ANPR were more mixed, raising a significant number of issues that will require additional analysis before any determination is made concerning how to proceed. Rather than delay addressing the issues covered by the OCC interpretations, we are issuing this final rule, which covers only the matters included in the NPRM, and are reserving a decision whether to proceed with a proposal to establish uniform fiduciary standards pending completion of our analysis of the issues raised by the commenters.

The OCC received 25 comments on the NPRM. These comments included 4 from state bank supervisors' offices, 1 from a state bank supervisors' organization, 6 from banking trade associations, 13 from banks and bank holding companies, and 1 from a law firm. Most of the commenters supported the proposed changes, although several offered additional suggestions for changes. The state bank supervisors disagreed with the proposal and expressed concern about the effect the rule would have on the application of state laws to national banks engaged in fiduciary activities.

For the reasons discussed below, we have adopted the provisions of the NPRM substantially as proposed, but have made a number of changes in response to the comments received to clarify certain provisions.

Description of Proposal, Comments Received, and Final Rule

Definitions (Revised § 9.2)

Proposed § 9.2 defined "trust office" and "trust representative office" in §§ 9.2(j) and (k), respectively. A "trust office" was defined as an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. A "trust representative office" was defined as an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity.

The final rule modifies the definition of trust office to clarify that it includes all offices where the bank engages in one or more of the key fiduciary activities specified in § 9.7(d) —i.e., accepting the fiduciary appointment, executing the documents that create the fiduciary relationship, or making discretionary decisions regarding the investment or distribution of fiduciary assets. The definition in the proposal focused on where the bank acted in a fiduciary capacity (where the key fiduciary activities were performed) and implicitly assumed that all of the key fiduciary activities would be performed in one state for each fiduciary relationship (so that "acting in a fiduciary capacity" and performing the key activities were the same). However, as discussed in detail below in connection with § 9.7(d), in some instances, the key activities may be performed at offices in different states for some fiduciary relationships. In those instances, as provided in § 9.7(d) ***34793** a bank must determine one state in which it acts in a fiduciary capacity for purposes of 12 U.S.C. 92a. That means that there will remain other offices in other states in which the bank performs key fiduciary activities that, under the definition in the proposal, would

not have been considered to be trust offices. However, our intention was that because each of these key activities is significant standing alone, all offices in which a bank engages in any of the key fiduciary activities should be considered to be trust offices. Therefore, the final rule clarifies the definition of "trust office" to be an office of a national bank, other than a main office or a branch, at which the national bank engages in one or more of the activities specified in § 9.7(d). A corresponding change has been made to § 9.2(k). A "trust representative office" is defined as an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not engage in any of the activities specified in § 9.7(d).

Section 9.2(k) of the proposal listed the following examples of ancillary activities: advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (e.g., forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or simply inspecting or maintaining custody of fiduciary assets.

A number of commenters suggested that various activities be added to the list of examples of ancillary activities. The list of ancillary activities set forth in § 9.2(k) is illustrative only, however, and not all-inclusive. While the OCC considers many of the suggested activities to be ancillary activities, we have not included most of them in the text of the final rule because the list set out in the definition is not intended to be comprehensive. A national bank may therefore identify additional activities as ancillary without seeking the express concurrence of the OCC. To make this clear, we have added to the text of the final rule an express statement that the items on the list are illustrative and that other activities may also be "ancillary" for the purposes of the definition.[FN2]

> FN2 Classifying activities as "ancillary" in §§ 9.2(j) and (k) is meant only to assist in the determination of the state in which the bank is acting in a fiduciary capacity for section 92a purposes. Only the key fiduciary activities in § 9.7(d) are relevant for determining that state; all other activities are "ancillary" for this purpose. This classification does not affect the importance of such activities or change in any way a bank's fiduciary duty with respect to such activities.

Two commenters urged that holding title to real property in any state be added to the list of ancillary activities in § 9.2(k), because some state laws attempt to prohibit out-of-state entities from taking title to real property without a state license or other authorization. Because this appears to be a specific issue warranting clarification, we have added holding title to real estate to the list of ancillary activities in § 9.2(k). The statutory authority for national banks to exercise fiduciary powers, 12 U.S.C. 92a, does not subject the exercise of a national bank's fiduciary powers to restrictions or preconditions, such as licensing requirements, under state law. State laws prohibiting out-of-state national banks from taking title to real property have such an effect. For these reasons, and because we believe that this activity is consistent with national banks' exercise of their fiduciary powers, we have added holding title to real property to the list of ancillary activities in the final rule.[FN3] Consistent with this change, we also have added language to § 9.7(b) to clarify that while acting in a fiduciary capacity in one state, a bank may act as fiduciary for relationships that include property located in other states.

> FN3 This is consistent with the Office of Thrift Supervision's (OTS) position under its parallel statute. See OTS Chief Counsel Opinion (August 8, 1996), reprinted in [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) 83-102 (OTS August 1996 Opinion) (holding title to real property as trustee in a state would not

cause a federal savings association to be located in that state because the activity is incidental and not discretionary).

As we stated in the NPRM, neither a trust office nor a trust representative office is a branch for purposes of the McFadden Act, 12 U.S.C. 36, which governs the location of national bank branches. In order to be considered a branch under the McFadden Act, a bank facility must perform at least one of the core branching functions of receiving deposits, paying checks, or lending money.12 U.S.C. 36(j). The locational limitations of 12 U.S.C. 36 are not intended to reach all activities in which national banks are authorized to engage, but only core branching functions. See Clarke v. Securities Industry Association, 479 U.S. 388 (1987) (considering securities brokerage powers) (Clarke). Proposed §§ 9.2(j) and (k) therefore stated that a trust office or a trust representative office is not a branch unless it is also an office at which deposits are received, or checks paid, or money lent.[FN4]

FN4 This final rule is consistent with the limitation, found in 12 U.S.C. 93a, which states that the general rulemaking authority vested in the OCC by that section "does not apply to section 36 of [Title 12 of the United States Code]." This limitation simply makes clear that section 93a does not expand whatever authority the OCC has pursuant to other statutes to adopt regulations affecting national bank branching. Congress clearly contemplated that the OCC would implement section 36, as is evidenced by the repeated references to obtaining the OCC's approval throughout that section (see, e.g., paragraphs (b)(1), (b)(2), (c), (g), and (i) of section 36). It would be illogical to conclude that the OCC, in implementing the provisions requiring national banks to obtain the OCC's prior approval under the sections cited, cannot interpret what the terms of the statute mean or that the interpretation must be made on a case-by-case basis. This rulemaking simply clarifies a situation that falls outside the branching restrictions imposed by section 36 .

Several state bank supervisors disagreed with the OCC's conclusion that fiduciary activities are not core branching functions and stated their belief that trust offices should be considered to be branches. They assert that the Clarke case held only that discount brokerage activities are not core branching functions and should not be read to conclude that any other activities are not core branching functions.

The OCC has carefully considered these comments, but remains of the view that fiduciary activities under section 92a do not constitute core branching functions and that a national bank office that provides only fiduciary services would not be subject to the McFadden Act. In Clarke, the Supreme Court held that the McFadden Act's locational limits do not reach all activities in which national banks engage. This conclusion in the Clarke case is reinforced by the recent decision in First National Bank of McCook, Nebraska v. Fulkerson, et al., Civil Action No. 98-D-1024, slip op. (D.C. Co. March 7, 2000), where the court held that the combination of a deposit production office, a loan production office, and an ATM do not constitute a branch because no core branching functions are performed.[FN5]

FN5 See also Bank One, Utah v. Guttau, 190 F. 3d 844 (8th Cir. 1999) (ATMs are excluded from the definition of "branch").

Finally, the second sentence in current § 9.2(g) provides that the extent of fiduciary powers is the same for out-of-state national banks as in-state national banks. We proposed to remove this sentence as unnecessary in light

of new § 9.7, which sets forth the rules concerning multi-state fiduciary operations. We received no comments on this proposed change, and have adopted it as proposed.*34794

Approval Requirements (revised § 9.3)

Current § 9.3(a) provides that "[a] national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26." Section 5.26(e)(5) currently provides that a national bank that has obtained the OCC's approval to exercise fiduciary powers does not need to obtain further approval to "commence fiduciary activities" in a state in addition to the state(s) described in the application for which it received OCC approval to exercise fiduciary powers. Instead, the bank is required only to provide written notice to the OCC within ten days after commencing fiduciary activities in a new state.

Under the proposal, a bank that has received OCC approval to exercise fiduciary powers does not need prior OCC approval each time it seeks to act in a fiduciary capacity in a new state or to conduct activities in a new state that are ancillary to its fiduciary business. Proposed paragraph (b) also directs the bank to follow the notice procedures in § 5.26(e)(5) (discussed below) in order to emphasize that revised § 9.3(b) is consistent with § 5.26(e)(5) and is not intended to impose any additional or different procedures on national banks. Current paragraph (b), which addresses the procedures for organizing a limited purpose trust bank, would be redesignated as paragraph (c).

We received one comment on this proposed change, suggesting that we clarify in § 9.3(b) that marketing and soliciting fiduciary business are included in ancillary activities. Because this is made clear in § 9.2(k), it is unnecessary to repeat it in this provision. The final rule has, however, been changed to reflect the modified definition of "trust office" in § 9.2(j). Consistent with § 5.26(e)(5) of the final rule, this provision now states that a national bank granted fiduciary powers by the OCC is not required to obtain the OCC's prior approval to engage in any of the activities specified in § 9.7(d) in a new state or to conduct ancillary fiduciary activities in a new state.

Multi-State Fiduciary Operations (New § 9.7)

The statutory authority for national banks to exercise fiduciary powers is contained in 12 U.S.C. 92a(a) and (b). In IL 872, IL 866, and IL 695, the OCC considered how the language of section 92a would be applied in an interstate context.

Under section 92a, national banks may exercise fiduciary powers with OCC approval.Section 92a(a) states:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located. (Emphasis added).

Section 92a(b) clarifies that, whenever state law permits state banks, trust companies, or other corporations that compete with national banks (State Fiduciaries) to exercise any of the fiduciary powers in section 92a(a), a national bank's exercise of those powers is deemed not to be in contravention of State or local law under section 92a.

Thus, "when not in contravention of State or local law" (the Contravention Clause), a national bank may act in any of the fiduciary capacities specified in section 92a(a). This statutory grant of authority does not limit where a national bank may act in a fiduciary capacity. Nor does it require that the customers for whom the bank may act or the property involved in the fiduciary relationship be located in the same state as the bank. A bank is free to act in a fiduciary capacity in more than one state.

The Contravention Clause in section 92a(a) requires that a national bank look to the laws of the state in which it acts, or proposes to act, in a fiduciary capacity to determine what fiduciary capacities are permissible.[FN6] The state in which the bank acts in a fiduciary capacity for each existing or proposed fiduciary relationship is the state in which the bank performs the key fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets. This state is also the state referred to in other provisions in section 92a that refer to state law (subsections 92a(b), (c), (f), (g) and (i)) (the Section 92a State).

> FN6 The last phrase in paragraph (a) of section 92a refers to the state in which the national bank is "located." The primary reference to a state is in the Contravention Clause regarding the right to act in fiduciary capacities (the language emphasized above). That language was in the statute originally, before the phrase using the term "located" was added. Thus, we believe that the reference to the state in which a bank is located refers to the state in which the bank is acting in a fiduciary capacity. We note that the OTS construes its parallel statute in a similar way. The OTS concludes that a federal savings association may exercise fiduciary powers permitted for state fiduciaries in the states in which it is located, but it is "located" for this purpose in the state in which it performs key fiduciary functions. See, e.g., OTS August 1996 Opinion.

Section 9.7 of the proposed rule reflected this interpretation of section 92a. In paragraph (a) of proposed § 9.7, we stated that a national bank may act in a fiduciary capacity in any state. Proposed § 9.7(a) went on to state that if a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in any of the eight fiduciary capacities expressly listed in section 92a(a) unless the state affirmatively prohibits that capacity for its own State Fiduciaries as well as any other capacity a state permits for its own State Fiduciaries. This authority exists even if the state purports to restrict it for national banks. If state law is silent with respect to one (or more) of the eight capacities listed in section 92a(a), then that capacity is not in contravention of state law and a national bank may act in that capacity.

These conclusions, along with a more complete explanation of their underlying reasons, were stated in IL 695 and IL 872. As previously noted, the proposal intended to reflect the conclusions reached in those letters and is based on the reasoning stated therein.

Most of the comments on proposed § 9.7(a) supported its adoption. Of these, several requested that we clarify that the question of where a national bank is located for purposes of section 92a is a question of federal law. Comments from several state bank supervisors objected to proposed § 9.7(a), on the grounds that it would permit national banks a competitive advantage by being able to expand their fiduciary activities into states notwithstanding state limits on who may act as fiduciary. These commenters maintained that section 92a preserves for each state the right to establish such limits. They also suggested that the determination of which state's laws govern the permissible capacities should be resolved by whether a national bank has its main office or a branch loc-

ated in that state.

As set out above, we believe that section 92a imposes no limitations on where a bank may act in a fiduciary capacity. Under the Contravention Clause, a state may not prohibit or restrict national banks (including out-of-state national banks) from acting in a fiduciary capacity in the state in any manner, unless it also limits its own State Fiduciaries.

Moreover, we disagree that "location" for purposes of section 92a is appropriately determined by the presence of a main office or bank branch. As previously discussed, the Contravention Clause of section 92a*34795 requires that a bank look to the laws of the state in which it acts in one or more fiduciary capacities in order to determine the limits on those capacities.

For the reasons discussed above, we have adopted proposed § 9.7(a) as proposed, making only stylistic changes to improve the readability of this provision.

Once the state in which a national bank is acting in a fiduciary capacity is identified, the fiduciary services may be offered regardless of where the fiduciary customers reside or where property that is being administered is located. This point was incorporated in proposed § 9.7(b), which provided that a national bank may market its services to customers in other states and solicit business from them. It also may establish and use a trust representative office for these purposes. Accordingly, a state may not prohibit or restrict out-of-state national banks from marketing to, or performing fiduciary functions for, customers in that state. Such state laws are not within the powers reserved to the states by section 92a, and so they cannot prohibit or restrict a national bank's exercise of its federally granted powers.[FN7] These conclusions are consistent with the conclusions set out in IL 866 and IL 872.[FN8]

FN7 See, e.g., Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996).

FN8 The OTS has reached the same conclusions under its parallel statute. See, e.g., OTS August 1996 Opinion (federal savings association will not be deemed located in a state where its only trust-related activities are marketing its trust services and performing incidental duties pursuant to its appointment as testamentary trustee or trustee holding real estate; and federal law would preempt state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state); OTS Chief Counsel Opinion No. 94/CC-13 (June 13, 1994), reprinted in [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) 82,814 (trust marketing and referral activities at affiliate's offices does not make federal savings association located at those offices; state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state are preempted).

A few commenters asked that we clarify that § 9.7(b) does not require a national bank to establish a trust representative office in order to market its fiduciary services to, or act as a fiduciary for, customers in any state. We agree that a bank need not establish a trust representative office; the reference to trust representative offices was intended solely to illustrate one option available to national banks who seek to market their fiduciary services. The final rule, like the proposal, states that a national bank "may" use a trust representative office to market its fiduciary services to and act as a fiduciary for customers in any state, indicating that use of a trust representative office is discretionary. As noted earlier, we also have added language to § 9.7(b) to clarify that while acting in a fiduciary capacity in one state, a bank may act as fiduciary for relationships that include property located in oth-

er states.

As previously discussed, section 92a imposes no geographic limit on where a bank may act in a fiduciary capacity. Similarly, there is no geographic limit on where a bank may offer services that are incidental to acting in a fiduciary capacity. Accordingly, proposed § 9.7(c) reflected the conclusions stated in the Interpretive Letters that a national bank with fiduciary powers may establish a trust office or trust representative office in any state. We received no comments on proposed § 9.7(c) as such, and we have adopted it as proposed.

Proposed § 9.7(d) clarified how national banks may determine the state in which they are acting in a fiduciary capacity. In IL 866 and IL 872, we concluded that a national bank is deemed to be "acting in a fiduciary capacity" for purposes of section 92a in the state in which the bank performs the key fiduciary functions of executing the documents that create the fiduciary relationship, accepting the fiduciary appointment, and making decisions regarding the investment or distribution of fiduciary assets. As proposed, § 9.7(d) incorporated this position and further provided that, if with respect to a particular fiduciary relationship these key fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity will be the state that the bank and customer designate from among those states. We specifically invited comment on ways to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity.

We received several comments relating to the determination of where a bank acts in a fiduciary capacity when the key fiduciary activities take place in more than one state. One commenter asked us to clarify whether it was our intent to have the choice of law clause in the trust's governing instrument be used to designate where the bank acted in a fiduciary capacity. Similarly, two commenters suggested that we look to the governing instrument to make the determination. A few commenters suggested that, where the designation could not be made by the governing instrument or the customer has not or cannot otherwise make the designation, the bank be permitted to do so alone. A few commenters also noted the importance of the meaning of the term "customer," noting that if defined too broadly, it could be quite burdensome for a bank to consult with customers to make the designation.

We agree with those commenters who pointed out the potential problems, in situations where a bank performs the key fiduciary activities in more than one state, of requiring a bank to obtain customer agreement concerning the state in which the bank will be deemed to be acting in a fiduciary capacity. For instance, a bank could be forced to obtain the agreement of many different people residing in several different locations. To avoid these problems, we have revised § 9.7(d) to provide that a bank performing the key fiduciary activities in more than one state for any particular fiduciary relationship may designate from among these states which state's laws are made applicable by operation of section 92a for that relationship. We have also made some minor changes intended to improve the readability of § 9.7(d), including a change in its heading.

Many of the commenters indicated some confusion over the significance of the determination of the Section 92a State.Section 92a directs the application of state law for purposes of determining a national bank's permissible fiduciary capacities (referred to in sections 92a(a) and (b)); for purposes of setting certain operational requirements for national banks as corporate fiduciaries (referred to in sections 92a(f), (g) & (i)); and for purposes of granting state banking authorities limited access to OCC examination reports relating to national bank trust departments (referred to in section 92a(c)). Proposed § 9.7(d) provided a means to identify which state's laws apply for purposes of section 92a when a bank is conducting multi-state fiduciary activities. As discussed more fully below, this determination is separate from the selection of the substantive law that governs matters affecting the exercise of the fiduciary appointment, such as standards of care.

Proposed § 9.7(e) provided a direct statement of how state law applies to a national bank engaging in fiduciary activities. As set out in the proposal, the state laws that apply to a national bank's fiduciary activities by operation of section 92a are the laws of the state in which the bank acts in a fiduciary capacity.

Two commenters suggested that we clarify that state laws may not impose operational requirements on national banks that engage only in limited trust operations. In both IL 866 and IL 872 we stated that section 92a does not "condition the exercise of fiduciary *34796 powers on compliance with state laws that purport to impose licensing or operating requirements on national banks."[FN9] This point is incorporated in § 9.7(e)(2) of the final rule, which provides that, with the exception of those state laws specifically referenced in section 92a, national banks' exercise of fiduciary powers is not subject to restrictions or preconditions under state law. Such restrictions and preconditions include, but are not limited to, state licensing requirements. This principle applies to the fiduciary activities of full service national banks as well as national banks that engage only in limited trust operations.

FN9 See IL 866 p. 9; IL 872 p. 10.

Section 9.7(e) does not affect the applicability of state substantive laws that govern the fiduciary relationship, such as the standard of care to be exercised by the fiduciary, or ability of a grantor to designate which state's laws govern the trust itself. A grantor is free to designate which state laws apply for all other purposes or to have the applicable law determined by choice-of-law rules. For example, if the bank acting in a fiduciary capacity in State A is trustee for a trust whose grantor and beneficiaries are located in State B and the trust, by its terms, is governed by the laws of State C, then the laws of State C will govern the administration of the trust. The choice of law clause in a trust instrument does not, however, determine where a bank is acting in a fiduciary capacity or the laws that apply by operation of section 92a. That determination is a matter of federal law pursuant to section 92a. It cannot be altered by agreement of the parties.

Several state bank supervisors objected to the conclusion that a national bank is not subject to state laws that restrict the activities of out-of-state fiduciaries. However, as discussed above, the Contravention Clause in section 92a only serves to limit national banks from engaging in fiduciary capacities that are not permitted for State Fiduciaries but does not otherwise limit a national bank's ability to exercise its federal authority in any state. State laws that are outside the ambit of the Contravention Clause, and so not authorized by Congress to apply to national banks, may not restrict or interfere with the exercise of permissible federal power. See, e.g., Barnett Bank, supra.

The state supervisors also pointed to discussion in earlier OCC interpretive letters, in particular IL 525, that suggested that all aspects of state law governing state fiduciary institutions applied to national banks. However, IL 525 was concerned primarily with the substantive fiduciary standards that would apply to national banks in certain trust contexts. As noted above, the substantive law governing a trust is a different matter than the law made applicable to national banks by operation of section 92a. Moreover, the discussion of state law in IL 525 did not involve an interstate situation and was focused on the issue of the substantive fiduciary law governing the fiduciary appointment. The OCC's analysis of the application of section 92a in the interstate context, including the manner in which it incorporates state law, is clearly set forth in ILs 872, 866, and 695, the NPRM, and this final rule. Any contrary implications in IL 525 do not represent the position of the agency.

Deposit of Securities with State Authorities (Revised § 9.14)

Under section 92a(f) and current § 9.14 of our regulations, a national bank must comply with state laws that require corporations that act in a fiduciary capacity to deposit securities with state authorities for the protection of